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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–214

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

THE WICHITA BOARD OF TRADE, ET AL.

No. 72–433

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE WICHITA BOARD OF TRADE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

MEMORANDUM FOR THE UNITED STATES

These are appeals by 34 railroads (No. 72–214), and by the Interstate Commerce Commission (No. 72–433), from a decision of a three-judge district court (Railroad J.S. App. C1) setting aside an order of the Interstate Commerce Commission. The Commission had found lawful tariffs establishing new charges for in-transit inspection of grain (Railroad J.S. App. A1,

B1). The district court ruled that the Commission had failed to explain adequately its departure from the standards it has long employed to determine the reasonableness of charges for accessorial services which had formerly been included in the line haul rate. It remanded the case to the Commission for further proceedings. But in addition, the court ordered that the tariffs, which became effective on May 4, 1971, be suspended "until and unless otherwise ordered by this Court" (Railroad J.S. App. C7).

In the district court, the Secretary of Agriculture intervened as a plaintiff pursuant to 7 U.S.C. 1291(b) and the United States filed a neutral answer. The United States does not now question the merits of the district court's decision. However, the district court's remedial order suspending the tariffs pending proceedings on remand has injected a new issue into the case. That issue involves the scope of the district courts' powers to suspend railroad tariffs following review proceedings under the Urgent Deficiencies Act, 28 U.S.C. 2321–2325. This remedial question is of a recurring nature and is of substantial importance to rail carriers and shippers. The United States therefore, as statutory defendant in proceedings under the Urgent Deficiencies Act, submits this memorandum setting forth its views on the remedial issue only.

Under Section 6 of the Interstate Commerce Act, 49 U.S.C. 6, the initiative and the responsibility for filing and publishing tariff charges is vested in the rail carriers. A change proposed by the carriers goes into effect after 30 days' notice (49 U.S.C. 6(3)) unless it is set down for investigation by the Commission and

suspended under Section 15(7), 49 U.S.C. 15(7). That Section provides that tariff changes proposed by the carriers are subject to investigation by the Commission on complaint or on its own initiative, and that the carriers have the burden of showing that the proposed change is just and reasonable. In such investigations the Commission may suspend a tariff for not more than seven months. "If the proceeding has not been concluded and an order made within the period of suspension, the proposed change * * * shall go into effect at the end of such period * * *." 49 U.S.C. 15(7). The revenues lost to the carriers during the seven-month suspension period are not recoverable by them even if their proposed change is subsequently sustained. However, if the tariff is placed in effect by the carriers on expiration of the suspension period, the Commission may require an accounting and refund to shippers upon an ultimate finding by it that the increases were not justified, 49 U.S.C. 15(7). In addition, even without a Commission accounting order, shippers may obtain reparation under Sections 8 and 9 of the Act, 49 U.S.C. 8 and 9.

The statute on its face, therefore, imposes upon carriers for a seven-month period an irrecoverable loss of revenue even if their proposed rate increase was lawful. After the suspension period, either prevailing side may recover—the carriers by retaining revenues received after the tariff went into effect, the shippers by reimbursement either by refund under Section 15(7) or by reparations under Sections 8 and 9. The decision of the district court disturbs this carefully balanced distribution of economic burdens between

carriers and shippers. By ordering on remand a further suspension period, beyond the seven months authorized by Congress, the court imposes a further permanent loss of revenue on the carriers.

Undoubtedly there will be particular cases in which shippers will suffer severe business injury as a result of increased rates going into effect while under investigation by the Commission, even though reimbursement is available to them if they ultimately prevail. Such a claim is advanced by the appellees here, who assert that they will be forced out of business by the increased inspection charge even if their objections are ultimately sustained. But after careful consideration, we have concluded that the statutory scheme, read in the light of this Court's opinion in *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, compels vacation of the remedial order issued by the court below.

The question in *Arrow* was whether Section 15(7) barred a single-judge district court from extending a suspension prior to the issuance by the Commission of a reviewable final order. This Court, grounding its decision in the historical origin of the statute, held that Section 15(7) did bar such relief. Prior to 1910, the Commission had no suspension power at all. However, the federal district courts, upon the request of shippers, frequently enjoined such rate increases pending the issuance of a final Commission order. This procedure was unsatisfactory in several respects. First, the injunctions typically issued only on behalf of a few major shippers; smaller shippers who had

been unable to join the suit remained subject to the higher rates and were therefore left at a competitive disadvantage. Second, the district court frequently lacked jurisdiction over some of the carriers who had put the new rates in effect; injunctions running only against some carriers resulted, in effect, in territorial discrimination. Third, different district courts sitting in different jurisdictions sometimes reached conflicting conclusions as to the reasonableness of the same proposed rates; the pattern of rates resulting in such circumstances had no rationality and was nearly impossible for the carriers to administer. In short, prior to 1910 the pattern of rates, pending a Commission order, was too frequently inequitable and economically irrational. This was inconsistent with the congressional goal of a national railroad system characterized by a coherent and uniform rate structure. Section 15(7) was the congressional response to this problem. Congress sought in Section 15(7) to provide the uniformity which had previously been lacking in this aspect of national transportation policy. See, generally, *Arrow Transportation Co.* v. *Southern Ry. Co.*, *supra*, 372 U.S. at 662–669.

On the basis of this history, this Court concluded in *Arrow* that by enacting Section 15(7) Congress not only gave the Commission a limited power to suspend the effectiveness of proposed rate schedules pending hearing and decision but also impliedly divested the courts of any such power. The Court further noted that this reading of the statutory history was buttressed by considerations of general principles of

judicial review of administrative proceedings (372 U.S. at 669–671):

> A court's disposition of an application for injunctive relief would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the admintrative domain. Judicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review.* * * Moreover, such a procedure would permit a single judge to pass before final Commission action upon the question of reasonableness of a rate, which the statute expressly entrusts only to a court of three judges reviewing the Commission's completed task.

It has been suggested that the *Arrow* result should be confined to judicial suspension of tariffs prior to entry of the Commission's final order and that a court reviewing a final order has full powers to suspend pending further Commission proceedings on remand. *Ad Hoc Committee on Consumer Protection* v. *United States*, 313 F. Supp. 119, 124 (D.D.C.). There a two-judge emergency panel of the court of appeals for the District of Columbia Circuit (which had no jurisdiction and was referring the case to the three-judge district court) indicated that upon review the district court would have power to enjoin tariffs which the Commission had finally sustained. That decision directly conflicts with the opinion of the three-judge court in *National Small Shipments Traffic Conference* v. *United States*, 321 F. Supp. 500, 515 (S.D. N.Y.). However, neither decision closely examined the statu-

tory scheme or this Court's reasoning in *Arrow* which, in our view, lead to the conclusion that a judicial order directly suspending a tariff after a final Commission decision (1) impinges upon the Commission's primary jurisdiction, and (2) raises the same risks of non-uniform results that attend judicial suspension prior to entry of the Commission's final decision.

To preserve the primary responsibility of an administrative agency for determining the public interest under the statute it administers, this Court has held that the functions of a reviewing court are limited to laying bare the agency's error and then remanding the case to it for determination under the correct standards and procedures. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 201. Thus if the district court had here ordered the Commission to disapprove the tariff change sought by the carriers, it would be violating the rule that such matters are exclusively for the Commission to decide. *United States* v. *Saskatchewan Minerals*, 385 U.S. 94; *Arrow Transportation Co.* v. *Cincinnati, N.O. & T. Pac. Ry.*, 379 U.S. 642. But an order suspending tariffs on remand would also "seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable." *Arrow Transportation Co.* v. *Southern Ry. Co.*, *supra*, 372 U.S. at 669–670. And, as this Court further noted in *Arrow* (372 U.S. at 670), "such consideration * * * [creates] the hazard of forbidden judicial intrusion into the administrative domain."

There would also be a significant danger of non-uniform results if reviewing courts were permitted

to suspend tarrifs pending further proceedings. Under the Urgent Deficiencies Act, there is no time limit for suits challenging orders of the Commission nor is there any provision for consolidation of review proceedings involving the same Commission order. Consequently, different courts can and do reach different results in suits by different parties concerning the same order. See *New York Central R. Co.* v. *United States*, 200 F. Supp. 944, 950 (S.D. N.Y.); *Denver & R. G. W. R. Co.* v. *Union Pacific R. Co.*, 351 U.S. 321, 326–327; compare *United States* v. *Florida East Coast Railway Co.*, No. 70–279 (argued December 7, 1972), with *Long Island R. Co.* v. *United States*, 318 F. Supp. 490 (E.D. N.Y.). This creates a serious risk of non-uniform results with respect to judicial suspension of the same tariffs pending remand of the same order by different courts. Such lack of uniformity would of course upset the basic statutory purpose delineated by this Court in *Arrow*.

In addition, judicial suspension of tariffs creates procedural problems. In the present case the district court could not order the Commission to suspend the tariffs on remand because the Commission has no power to order a further suspension period. Instead, because the railroads had intervened as parties in support of the Commission's order, they were directly enjoined from implementing their tariffs. If the railroads had not intervened, then the district court could not have enjoined them.[1] To threaten carriers with

[1] Because of the venue provisions of 28 U.S.C. 1398(a), which state that suits to enjoin Commission orders may be brought "only in the judicial district wherein is the residence or principal office of any of the parties bringing the action," it would not be feasible for plaintiffs to join all interested railroads as involuntary parties.

suspension as the price of intervening in support of orders in which they have a substantial interest is to impose a serious disadvantage on their exercise of the statutory right to intervene (28 U.S.C. 2323). Under the Urgent Deficiencies Act, only the United States is a necessary statutory defendant (28 U.S.C. 2322) and only the Commission's order is before the Court. While the order itself may be enjoined and set aside, neither the Urgent Deficiencies Act, the Interstate Commerce Act, nor the judicial review provisions of the Administrative Procedure Act (5 U.S.C. 701–706) provide for suspension of tariffs following conclusion of the review proceedings.[2]

The effect of the district court's order on the merits is to remand the case to the Commission to reopen the investigation. Congress has provided for only one seven-month suspension period during that investigation, and that one period has expired. Since the Commission cannot enlarge or renew it, it follows, *a fortiori*, that a court cannot do so. For in Section 15(7) Congress has declared suspension to be exclusively an administrative responsibility to be exercised within specific limits.[3]

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[2] In *Arrow* this Court carefully preserved the power of reviewing courts to maintain the *status quo* pending review by granting temporary relief. 372 U.S. at 671, n. 22. Under the scheme of the Act, however, the new tariffs are implemented, as they were in the present case, prior to review of the Commission's final order. See 49 U.S.C. 6(1), 15(7). An order by a reviewing court suspending the new tariffs thus has the effect of changing the *status quo*.

[3] If the Commission in its discretion decides not to suspend a tariff at all pending its investigation, its decision is not reviewable. *Arrow Transportation Co.* v. *Southern Ry. Co.*, *supra*, 372

CONCLUSION

For the reasons stated, the district court's order should be set aside insofar as it suspends the carriers' tariffs pending further proceedings on remand.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

KEITH A. JONES,
Assistant to the Solicitor General.

HOWARD E. SHAPIRO,
Attorney.

JANUARY 1973.

U.S. at 670, n. 21; *Port of New York Authority* v. *United States*, 451 F. 2d 783, 786–789 (C.A. 2).

It might be argued that since, under Section 15(7), carriers have the burden of justifying proposed tariff changes, if a court finds unsupported by substantial evidence the Commission's determination that they have done so, then the carriers should not have the right to collect any increases pending further Commission proceedings. But that is not this case. The ruling here was set aside because the district court found that the Commission had not adequately explained its ruling here in light of its earlier precedents. It was not a failure of proof by the carriers (under the Commission's newly adopted standard), therefore, but the court's finding of administrative error (in the Commission's failure to justify its apparent change of standards) which resulted in the remand. In these circumstances at least, the congressional policy of permitting the increase to remain in effect pending the Commission's investigation is compelling. For it was especially to protect the carriers from delays in the administrative process for which they were not responsible that Congress provided in 1920 that tariffs should become effective upon expiration of the suspension period.

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In the Supreme Court of the United States

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v.

THE WICHITA BOARD OF TRADE, ET AL., APPELLEES

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INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE WICHITA BOARD OF TRADE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

BRIEF OF THE SECRETARY OF AGRICULTURE

QUESTIONS PRESENTED

1. Does the fact that a proceeding involves a large number of rates relieve the Interstate Commerce Commission of its statutory obligation to determine their reasonableness under established standards?

2. Does a level of rates originally prescribed by the Interstate Commerce Commission in 1934 but substantially increased by the railroads over the years in a series of non-prescribed, non-reviewable ex parte increases constitute a prescribed level of rates against which the reasonableness of the rates and charges here in issue may be gauged?

3. Does a three-judge district court have jurisdiction, ancillary to review of a final order of the Interstate Commerce Commission approving a new charge, to enjoin collection of the charge upon a finding that the order of the Commission is not supported by substantial evidence?

STATUTES INVOLVED

The statutes involved are Title 28 U.S.C. §§ 1651(a), 1336(a), 1398, 2284 and 2321–2325; Title 5 U.S.C. § 706; and sections 1(5), 13(1), 15(1), 15(7) and 15a (2) (49 U.S.C. §§ 1(5), 13(1), 15(1), 15(7) and 15a (2)) of the Interstate Commerce Act. These statutes are set forth in the Appendix hereto.

INTEREST AND POSITION OF THE SECRETARY OF AGRICULTURE

By section 201 of the Agricultural Adjustment Act of 1938, 52 Stat. 36, 7 U.S.C. § 1291, the Secretary of Agriculture is authorized to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the Commission. The statute confers upon the Secretary the rights of a party before the

Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination. See *Sec'y of Agriculture* v. *United States*, 347 U.S. 645, 647 n. 1; *Secretary of Agriculture* v. *U.S.*, 350 U.S. 162, 163 n. 1. The Secretary actively opposed the surcharge here in issue before the Commission and joined appellees Wichita Board of Trade, et al. in the successful effort to have the Commission's order set aside and collection of the contested surcharge enjoined by the district court.

As the Commission has recognized, under the present grain marketing practice, the price received by the farmer is the market price less the local or gathering rate to the market. This, in effect, requires the farmer to bear the transportation cost. *Increased Freight Rates*, 1968, 332 ICC 714, 751. Any increase in that transportation cost is directly translated into a reduction in the price the farmer receives for his grain. In this case, the surcharge approved by the Commission effects a reduction of approximately one cent per bushel in the price the farmer receives for his grain.

In practice the farmer sells his grain to a country elevator and receives the price at the market that day less the elevator operator's commission and the total rail transportation charges, including the inspection charge, to the market. As to the farmer, the transaction is then complete and he is a stranger to the subsequent transactions which result in further sales of the grain and its movement to the market. For this

reason, he is not protected by the refund provision which the Commission is authorized to impose upon the railroads under section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), nor is he protected by the refund provision upon which this Court conditioned its stay of the judgment of the district court.

As the Commission observed, (App. 30), the Secretary does not oppose the concept of a separately stated inspection charge. However, he has consistently maintained that such a charge must be justified by the railroads, before the Commission, upon a record developed in consonance with the standards which the Commission has established and, heretofore, consistently applied for over half a century. In addition, the Secretary does not take issue with this Court's decision in *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658. However, he does not view that decision as a bar to the availability of equitable relief which is expressly provided for under the statutory scheme devised by Congress for judicial review of final action by the Commission. 28 U.S.C. §§ 1336, 1398, 2284, 2321–2325.

STATEMENT

These are direct appeals under 28 U.S.C. § 1253 from a decision of a three-judge district court (App. 100) which remanded to the Interstate Commerce Commission the latter's decision and order in I. & S. Docket No. 8548, *Inspection in Transit, Grain and Grain Products*, 339 ICC 364, 340 ICC 69 (App. 6 and 64, respectively), approving the imposition by the railroads of a separate charge for stopping carloads of grain in transit for inspection.

The Commission proceedings arose out of tariffs filed with the Commission by appellant railroads in February, 1970 proposing to establish a separate charge of $13.36 per car for the first stop in transit for inspection, a service which for many years had been embraced in the line-haul rates. At the hearing, the railroads stipulated that the cost of providing the first stop in transit for inspection was being recovered in the line-haul rates. However, noting the critical shortage of railroad cars and the fact that a 1968 amendment of the United States Grain Standards Act, 82 Stat. 761, 7 U.S.C. § 71 *et seq.*, had eliminated the requirement for official inspection of interstate grain movements, they urged the Commission to approve the proposed surcharge as a penalty to discourage and hopefully prevent grain shippers from availing themselves of the inspection privilege theretofore properly theirs under the applicable tariffs. The railroads presented evidence to show that the proposed surcharge roughly approximated the cost of the inspection service. They also presented estimates as to the increased availability of cars which would attend elimination of the service. However, notwithstanding the fact that cancellation of the availability of the service under the line-haul rates effected an increase in those rates, they presented no evidence to justify the increase. Further, they presented no evidence as to the insufficiency of the line-haul rates to cover the total transportation service provided, including the inspection, a showing which the Commission for many years had required as a prerequisite to approval of a separate charge for any portion of the total transportation service.

Protestants pointed out that the 1968 amendments to the United States Grain Standards Act were proposed by the Secretary of Agriculture in response to enforcement problems and to alleviate the burden mandatory inspection imposed upon grain merchandisers who moved large volumes of grain between their own storage facilities. Improvements in car utilization were contemplated only as a minor fringe benefit and in no event were the amendments designed to eliminate in-transit inspections, a result which the Secretary of Agriculture would have opposed vigorously. (V.S. 60, Tr. 757, 790).

In view of the stipulation by the railroads that the cost of the inspection service was already covered by the line-haul rates, the protestants, including the Secretary of Agriculture, opposed the additional surcharge, because, absent adjustment of the line-haul rate, it would result in a double charge for a single service. See *Inter Com Commis'n* v. *Chicago & Q R'D Co.,* 186 U.S. 320, 337. In addition protestants relied on the long established Commission principle that in order to prove such a charge just and reasonable under section 1(5) of the Interstate Commerce Act, 49 U.S.C. § 1(5), the railroads had the burden under section 15(7) of the Act, 49 U.S.C. § 15(7), to demonstrate the insufficiency of the line-haul rates to cover it, or, conversely, that the total transportation charges resulting from addition of the separate charge to the line-haul rates are just and reasonable. *Lighterage and Storage Regulations at New York,* 35 ICC 47, 61; *Manure from Jersey City, N.J.,* 40 ICC 465, 469; *Re-*

consignment Case No. 3, 53 ICC 455, 468; *Terminal Charges at Pacific Coast Ports*, 255 ICC 673, 677, 682; *Unloading Lumber at New York Harbor*, 256 ICC 463, 468; *Transit Charges, Southern Territory*, 332 ICC 664, 683. See also *Sec'y of Agriculture* v. *United States*, 347 U.S. 645, 652.

By report and order served April 21, 1971 (App. 6), the Commission's Division 2 found the proposed charge just and reasonable and otherwise lawful and discontinued the proceeding. Division 2 concluded that the in-transit inspection was neither mandatory nor essential to the orderly marketing of grain, that the evidence of the cost of the inspection stop adduced by the railroads justified the amount of the charge, that the charge would increase car utilization by eliminating the delays which attend inspection, and that its rule established in prior decisions requiring proof of the reasonableness of the total resulting charges was distinguishable because (1) the instant proceeding involved so many rates as to render such a requirement impractical and (2) the charge when added to the line-haul rate would not exceed the maximum level of rates prescribed by the Commission in Docket No. 17000, (Part 7), *Grain and Grain Products*, 205 ICC 301, 215 ICC 83. In a report and order on reconsideration served September 29, 1971, 340 ICC 69 (App. 64), the full Commission reaffirmed the earlier decision of Division 2.

Appellees brought this action in the United States District Court for the District of Kansas seeking to have the order of the Interstate Commerce Commis-

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sion annulled, enjoined and set aside. The district court held that the Commission had, without adequate justification, departed from the long-standing principle established in the above-cited cases and remanded the matter to the Commission for further proceedings. The district court also enjoined collection of the contested surcharge pending further order of the court.

Appellants filed motions for correction of opinion arguing that the lower court was without jurisdiction to enjoin collection of the charges. The district court entered an order denying these motions on June 8, 1972 (App. 108).

On June 9, 1972, the railroad appellants filed their notice of appeal with the district court (App. 109) together with a motion for stay of judgment pending disposition of the appeal. That motion was denied on June 19, 1972. Thereafter, the railroads, supported by the Commission, applied to this Court for a stay, which was granted on July 7, 1972 (App. 111). On July 20, 1972, the Interstate Commerce Commission filed its notice of appeal (App. 113). This Court noted probable jurisdiction and consolidated the two appeals on November 13, 1972.

SUMMARY OF ARGUMENT

I

The Interstate Commerce Commission approved imposition by the railroads of an additional charge for stopping carloads of grain in transit for inspection. That service had previously been provided under the line-haul rates and the railroads admitted at the hear-

ing that those rates contain compensation for the service. In a long line of decisions dating back over fifty years, the Commission has consistently held such charges to be unlawful unless the railroads could prove that their line-haul rates were not sufficient to recover the cost of providing the total transportation service, including the portion thereof for which a separate charge was proposed. See, e.g., *Reconsignment Case No. 3,* 53 ICC 455, 468; *Terminal Charges at Pacific Coast Ports,* 255 ICC 673, 677. The railroads offered no such proof here.

The Commission approved the charge nonetheless asserting that such a burden of proof would be intolerable in a case involving as many rates as this one. Instead of imposing the burden of proof heretofore required, the Commission simply coupled the proposed charge with the currently effective line-haul rates and, noting that in most cases the resulting total did not exceed the level prescribed in Docket No. 17000, Part 7, found the proposed charge just and reasonable.

The district court properly found that the Commission had not adequately justified departure from its long standing rule. The fact that many rates are involved does not excuse failure to require at least typical evidence upon which the Commission could have based an informed judgment as to the reasonableness of the charge. See *New England Divisions Case,* 261 U.S. 184, 197–198. Further, the *prescribed* level of rates utilized as a standard by the Commission was not prescribed at all. In actuality it was the level of rates reached as a result of aggregating carrier sponsored

general rate advances over the past thirty-five years. The reasonableness of that level has never been determined and therefore it cannot be used as the sole standard against which to measure the reasonableness of the total charges resulting from addition of the inspection charge to the line-haul rates. See, e.g., *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va.); *Mode-O-Day Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 325 ICC 390, 396.

Moreover, the Commission made no effort to determine the reasonableness of the now inspection-less line-haul rates notwithstanding the fact that they contain compensation for the inspection service. This, too, is a departure from prior norms for which the Commission offered no adequate justification. See *Terminal Charges at Pacific Coast Ports*, 255 ICC 673, 677; *Cancellation of Wharfage Absorption*, 335 ICC 477, 526. Considerations of car utilization do not overcome the Commission's duty to predicate approval of railroad rates and charges upon substantial evidence.

II

Congress has provided a comprehensive statutory scheme for judicial review of final orders of the Interstate Commerce Commission; and under that scheme the courts are empowered to grant injunctive relief to prevent irreparable injury. 28 U.S.C. §§ 1336, 1398, 2284, 2321–2325. The legislative history of these provisions clearly demonstrates that Congress intended that relief to be available notwithstanding the Commission's power to suspend rates prior to determination of their lawfulness.

In *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658, this Court held injunctive relief to be unavailable prior to entry of an order by the Commission upon completion of its inquiry into the lawfulness of proposed rates. However, the Court carefully confined the reach of its decision to that situation. The *Arrow* decision does not bar equitable relief upon judicial review of such order. *Ad Hoc Com. on Consumer Protection* v. *United States*, 313 F. Supp. 119, 124 (D.D.C.).

In view of the fact that the line-haul rates compensate the railroads for the inspection service, the addition thereto of a separate inspection charge results in a double charge for a single service. The transportation cost comes out of the price the farmer receives for his grain. He therefore bears the double charge although in most cases he has no direct connection with the transportation. If injunctive relief be denied, the farmer has no recourse because he has no alternative remedy.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT THE INTERSTATE COMMERCE COMMISSION HAD NOT ADEQUATELY EXPLAINED ITS DEPARTURE FROM PRIOR NORMS

A. IN APPROVING A SEPARATE CHARGE FOR A SERVICE ALREADY BEING PERFORMED AT THE LINE-HAUL RATE, WITHOUT REQUIRING INQUIRY INTO THAT RATE AND THE AMOUNT OF COMPENSATION INCLUDED THEREIN FOR THE PERFORMANCE OF THE SERVICE, THE COMMISSION DEPARTED FROM OVER FIFTY YEARS OF PRECEDENT

Where the railroads seek to establish a separate charge for a service theretofore encompassed in the line-haul, the Commission has for over fifty years re-

quired them to first demonstrate that the line-haul rate is insufficient to compensate them for the total transportation, including the service to be segregated. Stated conversely, it is the carriers' burden under section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), to demonstrate that not only the separate charge but also the total transportation charges resulting from its addition to the line-haul rates are just and reasonable. See *Terminal Charges at Pacific Coast Ports*, 255 ICC 673, 682.

The principle was articulated in *Lighterage and Storage Regulations at New York*, 35 ICC 47, 61, where with reference to a terminal service the Commission held:

> (W)here a terminal service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not now segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation heretofore received for such through service.

The principle was extended to inspection of grain in transit in *Reconsignment Case No. 3*, 53 ICC 455, 468, and has been consistently followed in similar cases since that time. *Terminal Charges at Pacific Coast Ports*, 255 ICC 673, 677, 682; *Unloading Lumber at New York Harbor*, 256 ICC 463, 468; *Transit Charges, Southern Territory*, 332 ICC 664, 683. See also, *Sec'y of Agriculture* v. *United States*, 347 U.S. 645, 652.

In the present case, however, the Commission failed to follow this established rule. Instead, and without

repudiating its prior decisions, it attempted to distinguish the present case from *Transit Charges, Southern Territory, supra,* the most recent of the above-cited line of cases, in which a similar charge was held unlawful. The Commission stated that "a requirement that the reasonableness of the proposed charges cannot be determined without 'reference to the line-haul rates, the services furnished thereunder, and the cost thereof,' effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a change" because of the thousands of individual line-haul rates involved. (App. 37). The Commission further held the more significant distinguishing feature to be that the line-haul rates when coupled with the inspection charge do not exceed the maximum level prescribed in Docket No. 17000, Part 7.

B. THE INTERSTATE COMMERCE COMMISSION DID NOT ADEQUATELY EXPLAIN ITS DEPARTURE FROM PRIOR NORMS

1. The fact that a proceeding involves a large number of rates does not relieve the Interstate Commerce Commission of its statutory obligation to determine their reasonableness under established standards

The district court perceived that the Commission was, in effect, excusing the railroad appellants from meeting their substantial burden of proof requirement because of their supposed inability to do so, and correctly rejected this rationale. (App. 103–104). The fact that a long-standing rule establishing a burden of proof may prove onerous in a particular proceeding is no justification for relieving the railroads entirely of their obligation to carry that burden.

The suggestion of the Interstate Commerce Commission that an impossible burden would be placed upon the railroads if they were required to adjust their line-haul rates by the amount of the compensation included therein for the inspection service is not sound. The Commission long ago devised a judicially acceptable solution to this problem by requiring introduction of typical evidence representative of the rate structure as a whole. See e.g., *New England Divisions Case*, 261 U.S. 184, 197–198. It was the statutory obligation of the Commission to determine the reasonableness of the charge consonant with the standards and procedures it had developed over the years in similar cases. The Commission may, of course, revise and adapt those standards and procedures to meet changing situations. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652. Here, however, the Commission made no attempt to adapt its standards and procedures to the situation with which it was confronted. Rather, it simply abandoned its statutory obligation to determine the reasonableness of the total transportation charges resulting from the new inspection charge superimposed upon the line-haul rate which for years has included an undetermined amount for the inspection service, a fact which the railroads conceded.

2. The docket No. 17000, Part 7, level of rates originally prescribed by the Interstate Commerce Commission in 1934 but now substantially increased through a series of non-prescribed ex parte increases does not constitute a prescribed level of rates against which the reasonableness of the rates and charges in issue may be gauged

Realizing, perhaps, the frailty of its rationale for departing from the rule of its prior decisions, the Commission made no mention of it in its summary of chief subsidiary findings. Instead, it predicated its approval of the charge on a finding that the proposed charges when added to the line-haul rates do not exceed the maximum level prescribed in Docket No. 17000, Part 7, *Grain and Grain Products, supra.* (App. 56.)

This finding, as it stands, is factually incorrect. What the Commission meant, as it acknowledges elsewhere in its report, is that the proposed charges when added to the line-haul rates do not exceed the maximum level prescribed in Docket No. 17000, Part 7, *supra, plus all subsequent authorized general increases.* (App. 38.) The distinction is significant, as but a single comparison readily demonstrates. The rate from Williston, North Dakota to Minneapolis, Minnesota prescribed by the Commission in 1934 was 27.5 cents per hundredweight. 205 ICC at 303. As a result of subsequent general increases, the rate between those same two points at the time the new charge became effective in May 1971 was 72.5 cents per hundredweight. This example is representative. Most, if not all of the grain shipments in the West move on rates which greatly exceed the rates prescribed in 1934 in Docket No. 17000, Part 7.

As noted above, the Commission has consistently required proof of the insufficiency of the revenues derived from the line-haul rate as a condition to approval of a separate charge for any portion of the service. It is at once obvious that comparison of the sum of the charge and the line-haul rates with the highest level of rates the Commission has ever approved does not satisfy this requirement. As the Commission stated in *Terminal Charges at Pacific Coast Ports*, 255 ICC 673, 677 "(t)heir proposal to establish an additional charge for a portion of the through services is not reasonable unless there is a clear showing that the existing rates are reasonable for the line-haul services alone, or that the increased total charges are reasonable for the aggregate services." The Commission there expressly held that proof as to the justness and reasonableness of the charge considered alone does not satisfy the railroads' burden. *Id* at 682.

The railroads suggest that the applicability of the Commission's long established principle depends upon whether or not the service sought to be segregated is part of the carrier's transportation obligation. (Railroad brief, p. 40.) However, the Commission has drawn no such distinction. See *Transit Charges, Southern Territory, supra*. As the Commission stated in *Lighterage and Storage Regulations at New York*, 35 ICC 47, 60, "the real subject of controversy is not the carriers' responsibility but the proposal to charge shippers [separately for the service.]" "Clearly, in the circumstances presented,

the proposed charge may not be divorced from the line-haul rate, for both, insofar as transit is concerned, are inextricably interdependent." *Transit Charges, supra* at 683.

Assuming, *arguendo,* that the Commission may relieve the railroads of the burden of demonstrating the insufficiency of the line-haul rates, can it fairly rely instead upon a comparison of the sum of the charge and current line-haul rates with the sum of the rates prescribed in 1934 and all subsequently authorized general increases? We submit that it can not. Even if one were to assume the present vitality of a level of rates prescribed nearly forty years ago, a highly doubtful assumption in view of the radical changes in the interim, the tremendous increases in the prescribed levels which resulted from the subsequent series of general revenue proceedings were not prescribed. See, e.g., *Ex Parte No. 115,* 208 ICC 4, 60; 223 ICC 657, 750; *Ex Parte No. 148,* 248 ICC 545, 613; *Ex Parte No. 162,* 264 ICC 695, 745; *Ex Parte 166,* 269 ICC 33, 55; *Ex Parte No. 168,* 272 ICC 695, 720; *Ex Parte No. 175,* 281 ICC 557, 644; *Ex Parte No. 196,* 298 ICC 279, 347; *Ex Parte No. 206,* 299 ICC 557, 583; *Ex Parte No. 212,* 302 ICC 665, 677; *Ex Parte No. 223,* 311 ICC 373, 384; *Ex Part No. 256,* 332 ICC 280, 346; *Ex Parte No. 259,* 332 ICC 714, 792; *Ex Parte Nos. 265 & 267,* 339 ICC 125, 175; *Ex Parte No. 281,* 341 ICC 288, 331. The Commission has never regarded the general increase level as prescribed. "The authority to increase rates granted in general rate advance cases . . . does not constitute an approval of any specific rate as a maxi-

mum reasonable rate." *Des Moines Union Ry Switching,* 231 ICC 631, 669. "Rates increased pursuant to authorizations in the general increase proceedings are not prescribed rates." *Confer, Smith & Co., Inc.* v. *Reading Co.,* 297 ICC 217, 222.

In general increase cases the Commission does not prescribe the increased rates nor does it pass upon the reasonableness of any particular rate or charge. Rather it looks at the carriers' revenue needs and the general level of all rates. *Brimstone R.R. Co.* v. *United States,* 276 U.S. 104, 122. No consideration is given to the basic rate structure; only the reasonableness of the proposed additional rate segment is considered. *Tennessee Products & Chemical Corp.* v. *Alabama G.S.R. Co.,* 277 ICC 207, 216. Increases which arise out of ex parte proceedings are therefore carrier made rates, not Commission prescribed rates and are open to challenge as to their reasonableness. *Mode-O-Day Corp.* v. *Atchison, T. & S. F. Ry. Co.,* 325 ICC 390, 396. It is precisely because general rate increases are carrier made and not prescribed maxima that the general revenue orders of the Commission have been determined to be unreviewable. See *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487, 494 (E.D. Va.); *Atlantic City Electric Company* v. *United States,* 306 F. Supp. 338 (S.D. N.Y.) and *Alabama Power Co.* v. *United States,* 316 F. Supp. 337 (D. D.C.), both aff'd 400 U.S. 73; *Electronic Industries Association* v. *United States,* 310 F. Supp. 1286 (D. D.C.), aff'd 401 U.S. 967.

In this case the Commission implied that notwithstanding the fact that the maximum rate level utilized

by the Commission in this case is not prescribed, it nonetheless constitutes a viable standard of maximum reasonableness because the grain rate structure has been subjected to continuing review by the Commission. The Commission relied for this proposition on *Grain and Grain Products,* 298 ICC 261; *Grain and Grain Products,* 329 ICC 824; and *Southeastern Assn. of R. & Util. Commrs.* v. *A.T. & S.F. Ry.,* 321 ICC 519. However, both of the *Grain and Grain Products* cases involved simply relief of the railroads from the mandatory rate break rule to permit them to establish non-uniform reductions for competitive purposes. Neither dealt with the maximum reasonable level of grain rates. In *Southeastern, supra,* the Commission consolidated several complaint proceedings, some of which did involve the question of whether particular assailed rates exceeded a maximum reasonable level. However, the Commission did not there essay an intensive investigation of the maximum reasonable level of all the grain rates affected by the charge here contested. Furthermore, even if it had, the Commission has since approved six general rate advances aggregating some thirty percent over the level in effect in 1964 when that case was decided. Therefore, we submit that the Commission cannot fairly utilize the ex parte rate level as a prescribed rate level obviating the necessity of inquiry into the reasonableness of the total charges resulting from addition of the inspection charge to the currently effective line-haul rates.

The Commission also cites *Grand Forks Chamber of Commerce* v. *Great Northern Ry. Co.,* 321 ICC 356, in support of its use of the ex parte level of rates as a

standard of reasonableness. (Commission brief, pp. 35, 41). However, there the inspection charge was coupled with a reduction in the line-haul rate, a factor not present in this case.

The Docket No. 17000, Part 7, level of rates certainly does not constitute a standard by which the reasonableness of the line-haul rates for those shippers who no longer take an in-transit inspection may be determined. When the Docket No. 17000, Part 7, level of rates was originally prescribed in-transit inspection was an integral part of the transportation service and compensation for such service was included in the line-haul rates. The reasonableness of the Docket No. 17000, Part 7, rates was and is therefore dependent in part upon the service which has now been taken out of the line-haul rates. Notwithstanding this rather obvious fact, the Commission failed to consider the reasonableness of the established level of rates as it applies to those shippers who no longer take advantage of in-transit inspection. They are still paying for a service which they no longer receive and upon which the Docket No. 17000, Part 7, level of rates was in part founded. It is axiomatic that when one or more of the elements which were included in the rates as originally prescribed is removed, that prescribed level of rates is no longer a valid measure of the reasonableness of the rates for the reduced service.

3. Cancellation of the inspection service without concomitant reduction of the line-haul rates resulted in a rate increase for which the railroads provided and the commission required no justification

The railroads contended before the Commission that they had no desire to collect the proposed inspection charge and that it was designed solely to eliminate in-transit inspection. However, they also stipulated that they were being compensated for the inspection service in the line-haul rate. Thus even shippers who forego inspection and avoid the separate charge continue to pay for the service under the line-haul rate. In cancelling the availability of that service under the line-haul rate, therefore, the railroads effected an increase in the line-haul rate for which they provided absolutely no justification. The Commission has consistently held it to be the burden of the carriers to justify the increase in such circumstances. See *Duluth Dockage Absorption,* 44 ICC 300, 302; *Atlas Portland Cement Co.* v. *N. & B. R.R. Co.,* 52 ICC 387, 389; *Loading of Less Than Carload Freight,* 91 ICC 394, 398. As the Commission noted in the last-cited case, "if the present rates were made to include this service . . . it would be unfair to shippers to require them to assume the entire burden and still pay the carriers for doing the work." Similarly, in *Cancellation of Wharfage Absorption,* 355 ICC 477, 526 the Commission held:

> The respondents now have in their tariffs an additive or additional charge, which they have initiated and we approved, designed to help defray port terminal expenses incurred in handling water-borne traffic. For respondents now to eliminate absorption of wharfage, which,

among other port terminal expenses, was a factor found to warrant the additive, without adjustment of the latter, would not be just and reasonable.

In approving the inspection charge, the Commission wholly disregarded the fact that those who forego the service would nonetheless continue to pay for it in the line-haul rate. Even handed justice would seem to require that the line-haul rates be proportionately reduced. See *Huron Milling Co.* v. *P.M.R.R. Co.*, 49 ICC 558, 560.

4. Considerations of car utilization are not relevant to the issue presented here as to whether the railroads proved the inspection charge to be just and reasonable

Appellants ascribe the Commission's approval of the contested surcharge largely to the laudable goal of securing increased utilization of railroad cars and thereby alleviating chronic car shortages. They contend that the Commission is obliged under the statutory rule of ratemaking, 49 U.S.C. § 15a(2), to consider the effect of rates in encouraging the more efficient utilization of cars. However, we note that neither the Commission nor the railroads give particular prominence to the provision in that section which requires the Commission to "give due consideration . . . to the need, in the public interest, of adequate and efficient railway transportation service *at the lowest cost consistent with the furnishing of such service.*" (Emphasis supplied.) Appellees do not dispute that the Commission may properly advert to the anticipated effect of a rate proposal upon car utilization. However, we do not understand appellants

to contend that such considerations justify abandonment of the traditional standards by which rate proposals must be judged. For this reason, we submit that such considerations are largely irrelevant to the issues presented here. It certainly cannot fairly be contended that, by determining that the aggregate of the inspection charge and the line-haul rates will not exceed the maximum ceiling resulting from the general revenue advances approved over the past thirty-five years, the Commission has satisfied its obligation to ensure that the total service is provided *"at the lowest cost consistent with the furnishing of such service."* (Emphasis supplied.)

The issue on appeal was the Commission's failure to consider the effect which the elimination of the performance of a first stop for inspection under the line-haul rates had upon the reasonableness of the line-haul rates. While car utilization considerations may support a finding of reasonableness for the imposition of a separate charge, on the theory that a separate charge will discourage intransit inspection, such considerations cannot justify the Commission's failure to consider the compensation already included in the line-haul rates for in-transit inspection before approving the separate charge. It is the imposition of the separate charge which tends to discourage intransit inspection, and this effect is in no way related to the level of the line-haul rates. The Commission cannot, therefore, argue that its failure to require an adjustment in the line-haul rates was in any way related to its desire to increase car utilization.

The Commission suggests that the contested surcharge is analogous to demurrage and other such charges which, in addition to compensation for use of railroad equipment, contain a penalty element designed to eliminate undue detention of cars. Such charges are justified on the basis that the shipper should be penalized for *undue* detention of cars for which the shipper is responsible. We do not dispute the power of the Commission, upon a proper record, to approve such a charge. However, in this case, there was no showing that the average of three days consumed by inspection results in *undue* detention ascribable to the fault of the shipper. Where delay is not his fault, the Commission customarily relieves the shipper of the penalty element of the demurrage charge. See, e.g., *Milburn Associates, Inc.* v. *Erie R. Co.*, 289 ICC 238, 240. We are aware of no authority, and the Commission has cited none, which would constitute precedent for the imposition of a purely punitive charge which results only in causing payments to be made to the railroads by shippers for using a service to which they are entitled under the carriers' tariffs. See *Iverson* v. *United States*, 63 F. Supp 1001, 1006, aff'd 327 U.S. 767, rehg. den. 327 U.S. 819.

II. THE DISTRICT COURT HAD JURISDICTION TO ENJOIN COLLECTION OF THE CHARGE

Appellants and the United States argue that by granting an injunction in this case the district court placed itself in square conflict with the decision of this Court in *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S.

658, and did violence to the statutory scheme there defined. Neither contention is correct.

A. THE STATUTORY SCHEME CLEARLY PROVIDES FOR EQUITABLE RELIEF UPON REVIEW OF COMMISSION ACTION

In the Act of June 18, 1910, commonly known as the Commerce Court Act or Mann-Elkins Act, 36 Stat. 539, Congress essayed solutions to a number of railroad problems only two of which are relevant here. The first of these was the problem created by shippers who resorted to injunctions to prevent proposed increases in rates from becoming effective prior to a determination of their reasonableness by the Interstate Commerce Commission. The second problem was that created by the railroads who resorted to injunctions ancillary to appeal to the circuit courts of final Commission determinations that rate increases made effective by the railroads were unlawful. For these two problems Congress devised in the Act of 1910 entirely separate solutions. In order to relieve the problem created by shipper resort to injunctions prior to Commission action, Congress amended section 15 of the Interstate Commerce Act to empower the Commission to suspend proposed rate increases pending investigation of their lawfulness. However, the problem created by railroad resort to the various circuit courts for injunction pending review of Commission rate orders was met by confining review of Commission decisions to a Commerce Court created by the Act for the purpose, which was staffed with circuit court judges, located in Washington, D.C., and invested with the same powers, including injunctive powers, theretofore exercised by the various circuit courts.

The nature of the problem created by shipper resort to injunctions prior to Commission action was succinctly outlined by the Court in *Arrow*, 372 U.S. at 663. The Commission recommend that it be granted suspension power to meet this problem, *Twenty-First Annual Report, Interstate Commerce Commission*, 1907, pp. 9–10; *Twenty-Second Annual Report, Interstate Commerce Commission*, 1908, pp. 10–12; 45 Cong. Rec. App. 106; and Congress amended section 15 of the Act accordingly. See H. Rep. 923, 61st Cong., 2d Sess. 3–4; 36 Stat. 552.

The railroads, on the other hand, had no occasion to solicit judicial intervention prior to Commission action since the Commission could at that time investigate only rates which were in effect and then only upon complaint. Thus the railroads were content to let the Commission's investigation take its course and had recourse to the Courts only when the Commission issued an order disapproving the rates in issue. They would then seek review of the Commission's order in whatever circuit they chose and were often successful in securing from the court selected an injunction against the operation of the Commission's order. See *Twenty-Second Annual Report, Interstate Commerce Commission*, 1908, p. 20. Since at that time an order of the Commission under the statute could be effective for a maximum of two years, by securing an injunction and protracting the litigation the railroads were often able to defeat the Commission's order entirely.

While the various circuit courts reached different conclusions with respect to the Commission's rate determinations, the principal problem was the ability

of the railroads upon a declaration of irreparable injury to secure injunctions and by protracting the litigation to largely or entirely escape the Commission's order. It was believed that a single forum schooled in the complexities of transportation law would best accomplish the expedition of this litigation. 45 Cong. Rec. App. 100, 123. Therefore, Congress created the Commerce Court, located in Washington, consisting of five circuit judges and entrusted to that court exclusive jurisdiction to enjoin, set aside, annul, or suspend orders of the Commission. See H. Rep. 923, 61st Cong. 2d Sess. 2; 36 Stat. 539. The Commerce Court possessed the same powers as had previously reposed in the circuit courts, including the power to enjoin the operation of orders of the Commission disapproving rates. 45 Cong. Rec. 4716–4717, 5410, 5423–5424, 5427–5428, 8238, App. 98. See also Hearings on S. 3297 Before the Senate Committee on Interstate Commerce, 62nd Cong., 1912, p. 42.

The provisions of the Commerce Court Act relating to that court were repealed and reenacted without material change as chapter 9 of the Judicial Code of March 3, 1911, 36 Stat 1146, 1169. However, two years later the Commerce Court was abolished and its jurisdiction transferred to the eighty-six district courts by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219. See 50 Cong. Rec. 4536, 4538. The relevant portion of that Act was drawn in large measure from the Sims bill, HR 5611, 63rd Cong. See Hearings on HR 5902 Before the House Committee on the Judiciary, 63rd Cong., 1st Sess., 1913, p. 15; Hearings on

HR 7898 Before the Subcommittee of the Senate Committee on Appropriations, 63rd Cong., 1st Sess., 1913, p. 336; 50 Cong. Rec. 4536. Abolition of the Commerce Court was vigorously opposed on the grounds that the scattering of its jurisdiction to the district courts would engender worse problems than those which led to its creation. See 50 Cong. Rec. 4536, 5418, 5421; Hearings on HR 7898 Before the Subcommittee of the Senate Committee on Appropriations, 63rd Cong., 1st Sess., 1913, pp. 62, 142, 145, 160, 213, 288. The venue provisions which would permit attack of the same Commission order in several courts were particularly objected to. *Id.*, pp. 271, 277, 278, 288–290. 50 Cong. Rec. 4536. The argument that the Commerce Court should be retained in the interest of uniformity was rejected on the ground that, in the last analysis, uniformity could only be assured by the Supreme Court. 50 Cong. Rec. 4209, 4536, 4543. See also Hearings on S. 3297 Before the Senate Committee on Interstate Commerce, 62nd Cong., 1912, p. 23. The provisions of the Urgent Deficiencies Act of 1913, including specific provision for injunction, have been carried forward substantially intact and are now found in §§ 1336, 1398, 2284, and 2321–2325 of the Judicial Code 28 U.S.C. §§ 1336, 1398, 2284, 2321–2325.

Thus, summarizing briefly, Congress sought to preserve the Commission's primary jurisdiction over railroad rates by entrusting to the Commission power to suspend proposed rate changes pending determination by the Commission of their reasonableness. On the other hand, in a separate forum under an entirely

separate statutory framework, Congress secured to persons aggrieved by the Commission's determination their right to judicial review and to equitable relief where warranted to prevent irreparable injury.

B. ARROW DOES NOT BAR EQUITABLE RELIEF UPON REVIEW OF FINAL ORDER

In *Arrow* this Court dealt only with the statutory provisions which empowered the Commission to suspend proposed rates pending investigation of their lawfulness. 49 U.S.C. § 15(7). The question presented was whether in enacting that provision Congress had intended to foreclose injunctive relief to a shipper or carrier in the event that the Commission's investigation consumed a period of time greater than the statutory period of suspension. While acknowledging the lack in the legislative history of unambiguous evidence of such a Congressional design, see 45 Cong. Rec. 6793, 7260–7264, this Court concluded that Congress had, at least impliedly, so intended. However, in so concluding, this Court confined its holding to the situation presented, i.e. judicial intervention prior to determination by the Commission of the reasonableness of the rates involved. Noting the "close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates," 372 U.S. at 668, the Court clearly and unequivocally distinguished that situation from a case, such as this one, in which the Commission has concluded its investigation and for which Congress expressly provided a judicial remedy, including the possibility of injunctive relief.

> A court's disposition of an application for injunctive relief would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain. *Judicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review.* These considerations explain why courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission. If an independent appraisal of the reasonableness of rates might be made for the purpose of deciding applications for injunctive relief, Congress would have failed to correct the situation so hazardous to uniformity which prompted its decision to vest the suspension power in the Commission. ***Moreover, such a procedure would permit a single judge to pass before final Commission action upon the question of reasonableness of a rate, which the statute expressly entrusts only to a court of three judges reviewing the Commission's completed task.*** (emphasis supplied, footnotes omitted) 372 U.S. 669–671.

Further, the Court pointed out that its holding of lack of jurisdiction to intervene in aid of the Commission's jurisdiction *prior* to Commission action did not "reflect in any way upon decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo*[1] by injunction

[1] In another context this power has been held to extend to *restoring* the status quo where action following upon the Commission's order would otherwise work irreparable injury. See *Chicago Junction Case*, 264 U.S. 258, 269.

pending review of an agency's action through the prescribed statutory channels." 372 U.S. at 671 n. 22. Finally, the Court quoted with approval the statement in *Cantlay & Tanzola, Inc.* v. *United States,* 115 F. Supp 72, 83 (S.D. Cal) that "(t)he Congressional intent [underlying § 15(7)] plainly is that the courts not interfere to suspend carrier-made rates 'prior to an appropriate finding by the Interstate Commerce Commission' " 372 U.S. at 667 n. 15.

The distinction between suspension prior to Commission action and injunction thereafter had been painstakingly drawn by the *Arrow* district court in its conclusions of law which the Court of Appeals quoted with approval, 308 F. 2d 181, 183:

> CONCLUSIONS OF LAW
>
> 1. Section 15(7) of the Interstate Commerce Act grants exclusive authority to the Interstate Commerce Commission to suspend proposed railroad rates and limits that authority to a period of seven months from the proposed effective date of the rates unless further extended by consent of the carriers proposing the rates. 2. Courts are without authority to enjoin or suspend the effectiveness of rates published by common carriers subject to the jurisdiction of the Interstate Commerce Commission before the entry of a final order by the Commission approving the rates. *The only jurisdiction of a court to enjoin or suspend the effectiveness of proposed common carrier rates arises after a final order of the Interstate Commerce Commission, and this is the authority vested in a specially constituted three-judge district court,*

upon complaint filed against the United States as a necessary defendant, to review the order of the Commission. (Emphasis supplied.)

The decision of the district court was affirmed, in turn, by the Court of Appeals and by this Court. Surely, in the face of the district court's second conclusion of law, quoted with approval by the Court of Appeals, this Court was constrained to dissent had it considered the view there expressed to be erroneous.

The *Arrow* decision involves only the suspension power contained in section 15(7) of the Interstate Commerce Act. It is clearly premised upon a presumed Congressional intention to preserve in the Interstate Commerce Commission exclusive jurisdiction to suspend proposed rates incident to its primary jurisdiction to determine their lawfulness. It stands as an exception to the general rule that federal courts can employ injunctive relief to prevent irreparable injury pending such administrative determinations. *West India Fruit & Steamship Co.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (2d Cir. 1948), cert. dis. 336 U.S. 908; *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S.D. N.Y. 1948), app. dis., 336 U.S. 941; *Pennsylvania Motor T. Ass'n* v. *Port of Phila. M. T. Ass'n.*, 183 F. Supp. 910 (E.D. Pa. 1960); *Board of Governors, Etc.* v. *Transamerica Corp.*, 184 F. 2d 311 (9th Cir. 1950); *Evans* v. *International Typographical Union*, 76 F. Supp. 881, 884 (S.D. Ind. 1948). The question of the jurisdiction of a district court to award injunctive relief after the primary jurisdiction of the Interstate Commerce Commission has been exhausted was not presented to the Supreme Court in *Arrow* and the

Court specifically disclaimed any intention of ruling upon that question. The rule established in *Arrow* should not be extended to oust federal courts of their traditional power to grant injunctive relief ancillary to review of administrative orders, a power specifically preserved by Congress under the statutory scheme. See 28 U.S.C. §§ 2284(3), 2324, 2325.

Furthermore, it is settled that district courts have jurisdiction to enjoin the effectiveness of rate schedules upon review of Commission action in complaint proceedings under section 13 of the Interstate Commerce Act, 49 U.S.C. § 13, *Inland Steel Co.* v. *United States*, 306 U.S. 153. Section 15(7) of the Act, 49 U.S.C. § 15(7), empowers the Commission to make such order with reference to a proposed rate as would be proper in a proceeding initiated after the rate had become effective, i.e. upon complaint under section 13 or on the Commission's own motion under section 15(1), 49 U.S.C. § 15(1). We perceive no relevant distinction between a proceeding under section 13 and a proceeding under section 15(7) which would justify denial of jurisdiction to enjoin the effectiveness of rate schedules in the latter type of proceeding. Upon completion of Commission action, injunctive relief is available in both. Moreover, any other conclusion would render nugatory the explicit provisions derived from the Urgent Deficiencies Act which expressly provide for injunctive relief.[2]

[2] For many years shippers were denied access to equitable relief because Commission orders of the type here involved were deemed to be negative and, therefore, unreviewable. See *Procter & Gamble Co.* v. *United States*, 188 Fed. 221, rev'd

Federal Power Commission v. *Idaho Power Co.*, 344 U.S. 17, 20; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 201; *United States* v. *Saskatchewan Minerals*, 385 U.S. 94; *Arrow Transportation Co.* v. *Cincinnati, N. O. & T. Pac. Ry.*, 379 U.S. 642; and *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, are not to the contrary. They stand simply for the general proposition that the function of the reviewing court ends when the error of law is laid bare. In other words, the reviewing court may not dictate to the agency the result it should reach on the merits. The action of the district court here remanding the case to the Commission is entirely consistent with those cases. However, they are not relevant to the question of the availability of equitable relief under the statutory scheme derived from the Urgent Deficiencies Act.

Appellants argue nonetheless that the principle established in *Arrow* should be extended to the instant situation because the broad scope of that decision has been consistently recognized in subsequent reported decisions dealing with the issue. They direct particular attention to *National Small Ship Traf. Conf., Inc.* v. *United States*, 321 F. Supp. 500, 515 (S.D. N.Y.); *Wirthmore Feeds, Inc.* v. *Baltimore and Ohio Railroad Co.*, 221 F. Supp. 745, 746 (W.D. N.Y.); *Port of New York Authority* v. *United States*,

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225 U.S. 282. However, that obstacle was removed by the decision of this Court in *Rochester Tel. Corp.* v. *U.S.*, 307 U.S. 125.

451 F. 2d 783, 786 (2nd Cir.); and *Oscar Mayer & Company* v. *United States*, 268 F. Supp. 977, 980 (W.D. Wisc.). *Port of New York Authority, supra,* and *Oscar Mayer, supra,* held unreviewable the action of the Interstate Commerce Commission vacating prior Commission orders suspending rates. The court in *Wirthmore Feeds, supra.* declined to extend the *Arrow* principle to rates published in violation of section 4 of the Interstate Commerce Act without prior Commission approval. Only the decision in *National Small Shipments, supra,* is apposite here and in that case the court held that it could not direct the Commission to reinstitute a suspension which had already continued as long as Congress allows. We do not dispute that particular holding here. The Commission's suspension power expires with the elapse of the statutory period and the court may not direct the Commission to exercise a power which it does not possess. However, that does not reach the question of the equitable powers of the court itself. We submit that the better view is that expressed by the court in *Ad Hoc Com. on Consumer Protection* v. *United States,* 313 F. Supp. 119, 124, which held that *Arrow* does not bar equitable relief after the Commission has completed its investigation.

We note also that under the statutory scheme of judicial review here in issue, three judge district courts are empowered to enjoin enforcement of Commission rate orders to prevent irreparable injury pending appeal to this Court. *Virginian Ry.* v. *United States,* 272 U.S. 658, 668–672. While the scope of judicial review may be limited, "(i)f the administra-

tive agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made." *Scripps-Howard Radio* v. *Comm'n.*, 316 U.S. 4, 10.[2] We submit that the principle enunciated in *Arrow* constitutes no bar to equitable relief where, as here, Congress has provided expressly not only for resort to the courts but also for injunctive relief.

It is argued that remand reinstates the primary jurisdiction of the Commission and that a district court may not enjoin collection of a rate or charge without unlawfully intruding upon that primary jurisdiction. We submit that this contention is premised upon confusion of the concept of primary jurisdiction with the scope of judicial review. Primary jurisdiction assures uniformity by affording the Commission the initial opportunity to pass upon the reasonableness of rates. Upon review the court is generally limited to ascertaining whether the Commission's determination is in conformity with the statute, has a rational basis, and is supported by substantial evidence on the record as a whole. If it is not, the court must afford the Commission the op-

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[2] Appellees Wichita Board of Trade, et al. have contended that continued effectiveness of the inspection charge may well drive some of their number out of business. In these circumstances we submit that the district court might properly have resorted to the All Writs Act, 36 Stat. 1162, 28 U.S.C. § 1651(a), to preserve its jurisdiction. See *Scripps-Howard*, *supra*, at p. 10, n. 4.

portunity to correct its error. However, this in no way militates against the availability of injunctive relief to prevent irreparable injury, especially where, as here, the applicable statute contains express provisions for such relief. If the Commission's order is sufficiently final to warrant judicial review, 28 U.S.C. § 1336, it is sufficiently final to warrant injunctive relief, where appropriate, under the concomitant provisions of the explicit statutory scheme provided by Congress, 28 U.S.C. § 2325. See *Ad Hoc Com. on Consumer Protection* v. *United States*, (D.D.C.) 313 F. Supp. 119, 124.

It is suggested that the availability of judicial review and equitable relief with respect to a single Commission order in more than one district argues against sanction by this Court of the injunction here issued by the district court. However, as noted above, this objection was raised in 1913 and rejected by Congress. It is a rare occurrence and, as was observed then, in the event of conflicts uniformity would be provided by the Supreme Court. Just as the Court granted a stay here it could resolve any problems arising from inconsistent treatment by different district courts of applications for injunctive relief from the same Commission order.

The United States suggests (Memorandum p. 8) that because of the venue provisions of 28 U.S.C. § 1398 it would not be feasible to join all interested railroads as involuntary parties. This, it is asserted, argues against the jurisdiction of the district court because railroads seeking to intervene in support of

Commission orders would risk injunction of their rates. We fail to grasp the basis of this argument. The limited territorial jurisdiction of the several circuit courts was one of the principal reasons for creation of the Commerce Court and for the provision that "(i)ts orders, writs, and process may run, be served, and be returnable anywhere in the United States." 36 Stat. 541. That provision was preserved in the Urgent Deficiencies Act of 1913, 38 Stat. 220, and is now found at 28 U.S.C. § 2321. The risk of injunction of their rates is present whether or not the railroads intervene and the writ may run anywhere in the United States.

We note the suggestion of the United States (Memorandum, p. 10 n.) that:

> It might be argued that since, under Section 15(7), carriers have the burden of justifying proposed tariff changes, if a court finds unsupported by substantial evidence the Commission's determination that they have done so, then the carriers should not have the right to collect any increases pending further Commission proceedings. But that is not this case.

We submit that that is precisely this case. The railroads conceded that they were imposing an additional penalty charge for a service for which they were at least partially if not fully compensated in their line-haul rate. (Tr. 258) Under the rule established in its prior decisions, the Commission was constrained to consider the sufficiency of the line-haul rates to cover the service prior to approving such a charge. This required the railroads to submit at least representative evidence of the total costs of providing

transportation, including the service, and the total revenues derived therefrom. No such evidence was submitted and accordingly, the district court found that the railroads had failed to sustain their burden. The United States suggests that in these circumstances "the carriers should not have the right to collect any increases pending further Commission proceedings." In this case the district court agreed and enjoined collection of the inspection charge.

Finally, the United States contends (Memorandum p. 3) that shippers need not resort to injunctions because, if a rate increase is ultimately found to be unlawful, they can secure refunds under section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), or obtain reparations under sections 8 and 9 thereof, 49 U.S.C. §§ 8 and 9. While these statutory provisions may protect certain shippers, they afford no remedy to the farmer who ultimately bears the inspection charge as a deduction from the price he receives for his grain. (Tr. 1299). See also Appendices to Memorandum of Secretary of Agriculture in Opposition to Application for Stay before this Court filed June 21, 1972). The railroads stipulated to the fact that the line-haul rates contain an element to cover the cost of the stop for inspection. (Tr. 231–233, 238, 258–266). The result of the Commission's order, therefore, is that the cost of the inspection is deducted twice from the price the farmer receives for his grain, once under the line-haul rate and a second time as a result of imposition of the contested inspection charge. The injury resulting from this burden is irreparable

if the district courts are without jurisdiction to grant injunctive relief.[4]

CONCLUSION

The judgement of the district court should be affirmed, the stay of that judgement vacated, and the case remanded to the Commission for further proceedings consistent with the opinion of the district court.

Respectfully submitted on behalf of the Secretary of Agriculture of the United States.

JOHN A. KNEBEL,
General Counsel,
HAROLD M. CARTER,
Acting Assistant General Counsel,
WILLIAM A. IMHOF,
KENNETH H. VAIL,
Attorneys,
United States Department of Agriculture,
Washington, D.C. 20250.

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I authorize the filing of this brief.

ERWIN N. GRISWOLD,
Solicitor General.

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[4] The inadequacy of reparations as a remedy to protect producers has long been recognized by the Commission and by Congress. See *Twenty-Third Annual Report, Interstate Commerce Commission*, 1909, 6; S. Rep. 355, 61st Cong., 2nd Sess. 8; 50 Cong. Rec. 5594.

APPENDIX

Title 28 U.S.C. § 1651(a)

§ 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Title 28 U.S.C. § 1336(a)

§ 1336. Interstate Commerce Commission's orders.

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in any part, any order of the Interstate Commerce Commission.

Title 28 U.S.C. § 1398(a)

§ 1398. Interstate Commerce Commission's orders.

(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

Title 28 U.S.C. § 2284

§ 2284. Three-judge district court; composition; procedure.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days' notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules or civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

Title 28 U.S.C. § 2321

§ 2321. Procedure generally; process.

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43

of Title 49, run, be served, and be returnable anywhere in the United States.

Title 28 U.S.C. § 2322

§ 2322. United States as party.

All actions specified in section 2321 of this title shall be brought by or against the United States.

Title 28 U.S.C. § 2323

§ 2323. Duties of Attorney General; intervenors.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

Title 28 U.S.C. § 2324

§ 2324. Stay of Commission's order.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the Action.

Title 28, U.S.C. § 2325

§ 2325. Injunction; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Title 5 U.S.C. § 706.

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Title 49 U.S.C. § 1(5)

§ 1. Regulation in general; car service; alteration of line.

(5) Just and reasonable charges.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Title 49 U.S.C. § 13(1)

§ 13. Complaints to and investigations by Commission.

(1) Complaint to Commission of violation of law by carrier; reparation; investigation.

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to

be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigation of said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Title 49 U.S.C. § 15(1)

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(1) Commission empowered to determine and prescribe rates, classifications, etc.

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property,

as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsover of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Title 49 U.S.C. § 15(7)

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(7) Commission to determine lawfulness of new rates; suspension; refunds.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Com-

mission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or

charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Title 49 U.S.C. § 15a(2)

§ 15a. Fair return for carriers.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are perscribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

U.S. GOVERNMENT PRINTING OFFICE: 1973

Supreme Court of the United States

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
and Intervenor-Defendant-Interveners,

Appellants,

v.

THE WICHITA BOARD OF TRADE, et al.,

Appellees.

On Appeal From The United States District Court For The District of Kansas

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BRIEF FOR WICHITA BOARD OF TRADE, et al.

CHARLES J. McCARTHY
1700 Pennsylvania Ave.
Washington, D.C. 20006

HAROLD S. SPENCER
DANIEL J. SWEENEY
20 North Wacker Drive
Chicago, Illinois 60606
Attorneys for Appellees

SIDLEY, McCARTHY, SPENCER, SWEENEY & HANKAWAY
Of Counsel

ROBERT MORRIS LAW PRINTING CO., Chicago, Illinois 60610 (312) 726-4451

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In the
Supreme Court of the United States

Nos. 72-214 and 72-433

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
and INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

THE WICHITA BOARD OF TRADE, et al.,

Appellees.

On Appeal From The United States District Court For The District of Kansas

---

BRIEF FOR WICHITA BOARD OF TRADE, et al.

STATUTES INVOLVED

Section 1(5) of the Interstate Commerce Act as amended, 49 U.S.C. § 1(5), provides:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 15a of the Interstate Commerce Act as amended, 49 U.S.C. § 15a, provides:

> (1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations and practices relating thereto.
>
> (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

Section 15(7) of the Interstate Commerce Act as amended, 49 U.S.C. § 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would

otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increase rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

QUESTIONS PRESENTED

1. Whether the Court was correct in holding that the railroads were not relieved of their normal statutory burden of proving that the aggregate of the existing rates plus the new inspection charge would be just and reasonable because a great number and variety of rates are involved.

2. Whether the fact that the aggregate of the applicable line-haul rates and the new inspection charge would not exceed certain defunct rates originally established thirty-seven years ago by the Commission and since increased over 150 percent by general revenue need increases relieved the railroads of their burden of producing evidence to show that such aggregate charges would be just and reasonable.

3. Whether the Commission was correct in shifting the burden of proof from the respondent railroads to the shipper protestants to produce evidence of the competitive truck and barge rates so that the issue of the effect on railroad revenue of prospective traffic diversion could be resolved.

4. Whether Section 15(7) of the Interstate Commerce Act, which provides that the Commission may suspend new charges for seven months while holding hearings and reaching its decision, precludes a Court which set aside such decision from restoring the *status quo* by enjoining the charges upon remand to the Commission.

STATEMENT

Opposition By The Grain Industry To This Proposal

These Appellees consist of the principal parties and witnesses who appeared before the Commission. Appellees are named in Appendix P and their members include thousands of farmers, country grain elevators, terminal elevators, grain merchants, boards of trade and grain exchanges, national associations representing producers, grain merchants and other segments of the grain industry, and state agencies representing agricultural interests. The array of grain industries allied on the same side against the railroads proposal in this proceeding is unprecedented in litigation involving grain rates. These Appellees speak

for the grain industry throughout the western United States.*

This broad opposition to the railroads proposal was engendered by two factors: (1) the railroads have admittedly published this charge for the primary purpose of creating an economic barrier against inspection in transit which would have the effect of destroying the existing marketing system for grain; and (2) the patent unreasonableness of adding a charge for grain inspection to existing rates which admittedwly include a compensation factor** for grain inspection, but without a concomitant reduction in the rates. Up until this time, whenever the railroads removed the inspection service they only did so when accompanied by reduced rates (A. 14).

The net effect is that the railroads seek double compensation for the same service, once in the existing line-haul rates and a second time by the separate inspection charge. Conversely, where grain inspections are precluded by the barrier effect of the charge, the result is that grain would continue to move at rates which include specific compensation for the inspection, but such service would no longer be provided at those rates.

Another point urged by the protestants on behalf of the grain industry was that because of the close competition between railroads, on the one hand, and trucks and barge lines, on the other, the effect of this increase in

---

*Appellants' briefs allege that only one-third of these Appellees were parties to the Commission proceeding. A review of the parties and witnesses to the Commission proceeding shows that the thirty-eight Appellees were either parties, witnesses or members of associations which were parties to the Commission proceedings, with the exception of California Grain and Feed Association, Pacific Northwest Grain Dealers Association and Peoria Board of Trade.

** It was conceded by the railroads that when the rates at which the grain moves were established they included compensation for the cost of providing inspection (R. 232-3; 238; 258).

total charges or reduction in rail services would be to make the railroad service less competitive and to cause substantial diversion of rail traffic to the other modes.

The Commission's decision summarized some of the more important reasons why inspection in transit has been the norm in the grain trade for many years:

> There is a need for a sampling and inspection of the grain at some time during the marketing process. The grade of the particular shipment must be determined before the majority of sales can be consummated. For a number of reasons it has been convenient for grain shippers and receivers to have the grain inspected while in transit. If a variance of the grade from what was offered is shown by the inspection, the shipment can be reconsigned to more appropriate markets. Also, there is less chance of deterioration than is the case if the inspection is made earlier at the point of origin. Finally, the possibility of bias is lessened if the inspection occurs after the shipment leaves the origin elevator.* (A. 17)

Another important reason for inspection of grain in transit, overlooked in the Commission's decision, is that it provides a means of offering each car of grain to a nationwide market of buyers through the grain exchanges. Typically, a carload of grain is shipped from a small elevator in the country to a primary market (such as Chicago, Kansas City, Hutchinson, Peoria, etc.) where a sample of the grain is taken in transit and rushed to the floor of the exchange where it is sold by grade and quality to the highest bidder on an exchange where nationwide buyers are represented. Such open competition effectively pro-

* One of the principal grain companies compared the grades of cars purchased and graded at origin in 1969 with the grades of the same cars at destination and found such wide discrepancies in favor of the sellers at the origin grades that it abandoned purchases at origin grades in 1970 (Ex. 99, p. 2). The summary comparison of their origin and destination grades is in Appendix B hereto. Also significant here is the fact that only 167 of the 8,700 grain elevators in the West have the automatic samplers at origin (Exs. 50 and 60).

vides the highest price to the farmer and also enables grain companies throughout the nation to enjoy the opportunity to purchase the grain. If the inspection in transit were eliminated or subjected to the economic penalty of a special charge, as here proposed by the railroads, the result is that the grain is channeled to the few buyers which maintain terminal elevators at each primary market and the grain would then be sampled after delivery to the buyer's elevator, a practice allowed without charge under the proposed tariffs. Thus, the railroads, who have claimed that they hope that the deterrent effect of the new charge would be so great that not "one penny" would be collected thereunder and all grain would move without inspection in transit, have taken deadly aim at the grain marketing system in this country as well as at the grain merchants and grain exchanges to which this system is vital.

Whether grain is deterred by this charge from inspection in transit or whether the inspection takes place and the charge is assessed, the farmer suffers a significant loss. In the former case he loses the prospective higher bid engendered by national (as opposed to merely local) buying competition; and in the latter case the inspection charge is deducted from the proceeds paid to the farmer, thereby reducing his income.*

The Railroads' Argument For An Inspection Charge

The railroads urged that inspection in transit uses extra car days and thereby effectively contracts the size of their

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* The grain industry witnesses testified that the farmer would ultimately have to bear this charge and affidavits submitted by members of the grain trade in opposition to the issuance of a stay herein showed that has actually taken place since the charges went into effect. (App. A hereto; Ex. 91; R. 1153, 1154)

fleet and contributes to car shortages; that the cars can be inspected as well at origin or destination as in transit; and read into the amendment of the Grain Standards Act in 1968 (removing the statutory requirement for inspection of interstate grain shipments) a revolutionary change in grain marketing and an invitation to facilitate that revolution by these new charges. That amendment received the uniform support of the grain industry, including these appellees, for the reason that it removed the mandatory inspection requirement under circumstances where it served no useful purpose. Prime examples of such shipments which need not be inspected are intra-company movements (where no sales transaction is involved) and direct shipments to feedlots (where the grade and quality of the grain is not so significant).

The Commission's View Of The Grain Standards Act

Although of dubious relevance to the issues under the Interstate Commerce Act which the Commission was required to decide, reams of legislative history concerning the 1968 amendment to the Grain Standards Act were introduced into the record before the Commission, primarily by the railroads.

From all of that, the Commission concluded that improved car utilization was not the primary factor in the enactment of the 1968 amendment to the Grain Standards Act, but that it was a "consideration". (A. 16) The Commission also noted as significant the fact that prior to the amendment the requirement of inspection could have been satisfied by inspection at origin or at destination, thus recognizing that the railroads' argument that inspection in transit was somehow a creature resulting from the now-deleted provisions of the Grain Standards Act was a misconception (A. 14). The invalidity of the railroads' theory that the amendment brought an end to the era of inspection in transit is even more conclusively established by the fact

that during the year following the revision there were more inspections in transit on the western railroads than during the year preceding it (A. 10).

While the Commission thus failed to find any mandate for the elimination of inspection in transit in the Grain Standards Act, it treated the existing grain marketing system more harshly. It noted that inspection of grain in transit "provides a logical and practical way for buyers and sellers to be assured of the grade or quality of grain in a particular shipment" (A. 36); that "the orderly marketing of grain under present practices requires that a substantial portion of the commodity moving in commercial channels must be subjected to some form of sampling and inspection to determine grade or quality"; but concluded ultimately that "it is not essential to the marketing process that this sampling and grading take place while the grain is in transit on the railroad (A. 35)".

In the District Court, Appellees did not ask a review of the evidence in order to test the Commission's conclusion that it is not "essential" to the marketing of grain that it be inspected in transit because none of the issues as to the lawfulness of the railroads' proposal turns on that point. What is important is that the grain marketing structure as it exists has been built upon inspection in transit; that this is an important feature of the service available under the line-haul rates as they have existed for many years; and that the removal of inspection service from the line-haul rates and the imposition of an additional charge for such service would undisputedly have a major impact upon the grain marketing system as it exists today. All of this underscores the point that the railroads were required to establish fully the lawfulness of their proposal under the Interstate Commerce Act. The amendment of the Grain Standards Act in 1968 in no way contemplated elimination of the general practice of inspection in transit. Nor did it

authorize a waiver of the Interstate Commerce Act to create tariff provisions eliminating inspections without a showing that they conform to the statutory requirements of justness and reasonableness. The Interstate Commerce Commission was not called upon to interpret and apply the Grain Standards Act and its decision must be tested by the standards of law which it has been created to apply under the Interstate Commerce Act.

The Major Errors In The Commission's Decision

On review of the Commission's decision, the District Court set it aside for the reasons that the railroad had failed to present any evidence to meet their burden of proof that the aggregate of the existing rates plus the proposed additional charge for the inspection service would be just and reasonable when measured by a comparison with the total cost of the services involved; that the railroads were not relieved of their burden of presenting sufficient and representative evidence as to the combined rates and charges because a broad geographic area and thousands of rates were affected by the proposal; and that the mere fact that the combined rates on which the traffic moves plus the charges would not exceed the level of certain "paper" rates* prescribed by the Commission in 1934 plus all in-

* The term "paper" rates refers to rates which were originally published in tariffs years ago but at which the traffic can not or does not move today. Thus, they have a mere existence on "paper" but are not viable rates. Typically, rates become paper rates when during the passage of time it develops that they are too high to move the traffic and are supplanted by lower scales of rates and are maintained in the tariffs for special reasons. Here the Docket 17000 rates relied upon by the Commission in its decision as the standard of just and reasonable rates were described by the railroads' principal witness as mere "paper" rates today, which move little or no traffic but have been maintained in the tariffs because the Commission's 1934 order in that proceeding has never been revoked. (Ex. 1, p. 11; R. 26, 44)

tervening general increases during the past 35 years neither excuses the railroads from their burden of proof nor satisfies it.

The Court rejected the exception to the general statutory proof requirement that the Commission attempted to carve out, *i.e.*, that if the railroads failed to present proof as to the total costs and services involved because of alleged difficulty in amassing such proof, they are excused from that burden if they show merely that the aggregate would not exceed certain other rates established 35 years ago plus intervening general increases. (A. 102-105).*

Another major error in the Commission's decision also relates to the burden of proof which the railroads must meet in an investigation proceeding. Where, as here, they are engaged in intense competition with trucks and barges for the grain traffic involved, the railroads are required to prove that the increase in the total charges and the removal of a valuable service advantage from the line-haul rates would not result in such substantial diversion of traffic as to cause a revenue loss. The railroads' witnesses uniformly testified as to the keen competition with these other modes and the grain industry witnesses generally testified that the results of the railroads' proposal here would be substantial diversion from the rails. The Commission disposed of this issue by finding that "comparative costs" for movement of grain by railroad versus by truck or barge are "essential before a decision can be reached on diversion" and, finding no such evidence in the record, it resolved the diversion issue in favor of the rail-

* The Commission recognized that the generally applicable rates, on which the grain traffic actually moves, are on a lower level than the Docket 17000 prescribed rates plus intervening increases (A. 14).

roads. Since Section 15(7) provides that the burden of proof in the Commission proceeding was upon the railroads, the Commission's error inheres in its failure to so find and to conclude that in the absence of "essential" evidence the railroads had failed to prove their case. Although the District Court did not reach this issue because of its holding that the Commission failed to apply the statutory burden of proof as to the total rates and charges involved in this case, this Court is being asked to resolve this issue here, regardless of the conclusions which may be reached on the issues ruled upon by the District Court. The matter of burden of proof as to diversion of traffic in proceedings such as this is of great interest to shippers generally and the Commission's misunderstanding of the statutory requirements should be rectified even though the District Court's decision is affirmed on the grounds stated in its opinion.

Both of the main issues on the merits have in common the complete failure or refusal by the railroads to introduce evidence on such issues. Consequently, there is a complete failure of proof in the record as to two issues which the railroads had the burden of proving before the Commission in order to justify their proposal. The District Court held that the Commission had failed to properly apply the burden of proof imposed by the statute upon the railroads in this case and, in view of the utter failure of proof by the railroads in the record, enjoined or "suspended" the application of these new charges *instanter* and remanded the matter to the Commission for further proceedings consistent with its opinion.

Issues Raised By Appellants

In its Jurisdictional Statement the Commission stated that "no appeal is taken from the remand on the merits" and asked for reversal of only that part of

the District Court's opinion which suspended and made ineffective the charages.* The Department of Justice has filed a memorandum in this case which takes no issue with the District Court's decision on the merits but concurs in the Commission's position that the District Court does not have the power to enjoin or suspend the charges upon a decision setting aside a Commission order which allowed such charges to remain in effect. The railroad Appellants raised that issue and also challenged the District Court's opinion on its merits.

If Appellants' argument that, upon setting aside a Commission decision for the railroads' failure to meet their burden of proof, the District Court is impotent to protect the shipping public in appropriate cases by enjoining the new charges pending any further judicial appeal and further Commission proceedings were sustained, the result would be that the railroads could continue the disassembly and destruction of the grain marketing system and accomplish their purpose by lengthy litigation, even though they had failed to meet their statutory burden of proof and had lost their case. We believe that in a case where the railroads have not carried their burden of proof the law provides more protection for shippers than the prospect of further years of litigation and the concomitant destruction of their marketing system.

Directly pertinent here is the report recently lodged by the railroads with this Court covering the six months period April through September, 1972 which shows that

* The Commission has now filed a brief in which it not only urges the sole point raised in this appeal but also endeavors to challenge the District Court's decision on the merits. This reversal of its posture apparently runs contrary to Rule 15 of this Court which provides that only the questions set forth in the Jurisdictional Statement will be considered.

approximately one third of the inspections which would have taken place were deterred by the charges. The affidavits submitted by these Appellees in opposition to the issuance of a stay showed that while the charges are in effect the farmers must absorb 1 cent per bushel out of their selling price (which can never be restored to the farmers since they do not pay the freight charges to the railroads and would not be reimbursed in any event); that the farmers lose the price benefit of competitive bidding on the broad markets otherwise available to them; that the grain merchandisers suffered a loss of 40 percent in the volume of their business due to the deterrent effect of the inspection charge during the first year that the charge was in effect; that many of such merchandisers have been carrying on their business at a loss since the charge became effective and if the charge remains in effect much longer several of them would be forced out of business; that recently 26 of the grain inspectors employed at the Chicago market were discharged because of lack of business due to the inspection charge and that such people must seek employment in other fields; and that "the railroads, by keeping this charge in effect for a sufficiently long period of time can succeed in substantially destroying the marketing system for grain which uses inspection and has been in existence for over 40 years, regardless of whether they ultimately prevailed in this case" (Affidavit of Howard Stotler filed with Memorandum of Secretary of Agriculture in Opposition to Application for Stay of Judgment and attached hereto as Appendix A).

On its face, the proposed charge is an attempt to assess an additional charge on top of line-haul rates which concededly already include a compensation factor for that service, but without a concomitant reduction in the rates.

Car Supply

The railroads urged that their main goal was to conserve car supply and relieve partially the car short-
to conserve car supply and relieve partially the car short-
age problem by deterring the trade from inspection in transit.* The Commission, thoroughly aware of the chronic car shortage problem and the criticism and outcry attendant thereto, was evidently so bedazzled by the claim that the new charge would alleviate car shortages that it concluded to approve the proposed charge regardless of whether or not the evidence showed compliance with the statutory requirements of proof under the Interstate Commerce Act for changes in rates and charges. This is the only factor which could account here for the Commission's total abdication of its statutory function of requiring evidence to satisfy the burden of proof of the basic elements of justness and reasonableness. Yet, in its decision the Commission took great pains to state that "we have con-

* In this respect the new charge has been only a moderate success. The report filed by Appellant railroads with this Court on January 5, 1973 shows that during the most recent 6-month period reported, April through September, 1972, there were 129,982 cars inspected as compared with 189,559 during the same months of 1971, a drop of 31 percent. While this shows a substantial reduction in the number of cars inspected due to the deterrent effect of the charge, it also shows that on most cars the effect has been the performance of the same service as in the past but at higher aggregate charges. It should be noted that the claimed 3 days per inspection can only be attributed to the railroads operating practices inasmuch as the tariffs allow the shippers only a few hours for inspection, *e.g.*, less than one-half day is permitted at Chicago (Ex. 89, p. 6).

cluded the charges shown to be just and reasonable on the usual basis of review" before giving any consideration to the assertion that the charges would help the car supply.* In any event, the Commission purportedly reached its conclusion that the rates and charges are shown to be just and reasonable apart from the consideration of car supply effect and it should be reviewed on that basis.

Thus, there is no question here presented as to whether car supply considerations can relieve the railroads of their normal statutory burden of proving the justness and reasonableness of the affected rates and charges. Even if that question were present it is difficult to conceive that a policy goal could justify the approval of rates and charges which do not meet statutory requirements. The Commission's decision obviates any necessity for considering here the question of the effect of the proposed charge on car supply or whether a showing of a positive effect on car supply could negate statutory requirements.**

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* In a rather candid separate expression concurring in the result the Chairman of the Commission allowed that the collateral effect of the proposal on car supply served to "quiet the doubts held concerning the legal aspects" of the new charge.

** In the six month report filed with this court by Appellees on January 5, 1973 they claimed putative savings in car days of 212,859 days during this six month period April, 1972 through September, 1972. On an annual basis this would be the equivalent of about 1,200 additional cars per year saved, without giving any effect to the additional offsetting car days lost due to the substitution of inspections at origin or destination in lieu of in transit. The same report shows that there were 129,982 cars inspected in transit during those six months which, at the going rate of $17.00 per inspection, means $4,419,000.00 per year additional revenue to the 19 reporting railroads for performing a service already compensated by the line-haul rates.

SUMMARY OF ARGUMENT

The basic deficiencies in the Commission's decision arise out of its efforts to disregard statutory standards and to find the aggregate of the linehaul rates and the new charges just and reasonable in the absence of any evidence addressed to such standards. The Commission was misled into these errors by the railroads' vociferous claim that the new charges would discourage inspection and thereby improve the car supply. Yet, the Commission's decision purports to find that this proposal meets the normal statutory requirements, despite the conceded lack of any evidence addressed to their burden of proof to compare the total costs and revenue for the total services involved and to show that this increase in total charges will not result in diversion of traffic to their truck and barge competitors. In the face of this deliberate failure to present any evidence to meet the plainly stated requirements of Section 15(1) and 15a(2) of the Interstate Commerce Act, the District Court acted properly in exercising its ancillary equitable power to enjoin the unjustified new charges during the period of remand to the Commission.

I.

The Commission's conclusion that the statutory requirement of comparing total costs and revenue does not apply in a case where thousands of rates are affected is specious. If anything, the public interest affected by such broad rate changes is so great as to compel with even greater force the application of the statutory standard to this case. In any event, in fashioning this new "rule" the Commission has ignored its own practice over the years as well as the holding of this Court in the *New England Divisions Case*, 261 U.S. 184, 197 and subsequent cases

that the proof requirement in major cases can and should be fulfilled by showing typical evidence representative of the rate structure.

The second basis upon which the Commission here rested its effort to excuse the railroads from their burden of proof to show cost and revenue comparisons for the aggregate charges is equally specious. The asserted statutory exception is that where the proposed change in aggregate charges for the going rates at which the grain traffic moves would not exceed the level of certain "paper" rates prescribed by the Commission in 1934 plus all the intervening general percentage revenue increases they are automatically deemed just and reasonable without any proof. The latter rates have been increased 150 percent since 1934; bear little resemblance to the lower rates on which grain actually moves today; and were prescribed based upon evidence of transportation conditions which are admittedly different from those extant today. In an unbroken line of cases the Commission has argued and the courts have held that the Commission in general revenue need cases does not consider or establish the justness and reasonableness of the millions of rates affected by such nationwide percentage increases and that such decisions are therefore not judicially reviewable. *Alabama Power Company* v. *U.S.*, 316 F. Supp. 337 (D.C. 1939), *affirmed*, 400 U.S. 73 (1971); *Algoma Coal & Coke Co.* v. *U.S.*, 11 F. Supp. 487 (E.D. Va., 1935). Thus, the Commission can not rely upon its allowance of general increases as establishing a current standard of maximum reasonable rates on grain.

On the second issue, that of traffic diversion to trucks, the railroads similarly offered no proof and, again, the Commission excused them from the proof specifically required by Section 15a(2) of the Act. Contrary to Section 15(7) of the Act, which imposes the burden of proof

on the railroads, the Commission found that comparison of truck rates with the proposed aggregate charges, was "essential" to a decision on the diversion issue and, finding no evidence on this issue, unlawfully shifted the burden to the shippers. There is no warrant in the statute for relieving the railroads of their burden of proof and imposing it upon the shippers on this issue.

II.

Where, as here, the new charges are having an immediate impact upon the grain marketing system, the business volume of the grain merchants, the employment of grain inspectors, and the lower prices being paid to the farmers (none of which can be remedied by a later rate refund) the ancillary remedy of enjoining the rates during remand as afforded by the District Court is critical. The question of the survival of the inspection marketing system could well be decided by attrition during the period of remand unless this protection were afforded to the grain trade. Appellants' argument that Section 15(7) of the Act as interpreted by this Court in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963), prohibits the District Court from exercising this ancillary equitable power is misconceived. Section 15(7) only purports to control the suspension of rates up until the time the Commission has entered a decision, not after, and this Court in *Arrow* expressly approved the power of the reviewing courts to enjoin the affected rates after the Commission's decision (pp. 669-70). There are a number of precedent cases upholding the power of the reviewing courts to enjoin the collection of rates approved by an invalid decision of the Commission or of some other agency. *Cantlay & Tanzola* v. *U.S.*, 115 F. Supp. 72 (S.D. Cal., 1953); *United States* v. *Morgan*, 307 U.S. 183, 191 (1939).

ARGUMENT

I.

THE RAILROADS WERE NOT RELIEVED OF THEIR BURDEN OF PROVING THAT THE AGGREGATE OF THE AFFECTED RATES PLUS THE INSPECTION CHARGE WOULD BE JUST AND REASONABLE BECAUSE A GREAT NUMBER AND VARIETY OF RATES ARE INVOLVED.

The proposed tariffs would modify the existing line-haul rates by providing that the service of inspection in transit is no longer encompassed by such rates and by establishing a separate charge of $17.00 per car to be added whenever such service is requested. Thus, the proposal would effect a change in the existing line-haul rates by deleting a part of the service embraced and establishing a new charge for the service. Section 1(5) of the Interstate Commerce Act (the Act) requires that "all charges" for transportation or in connection therewith "shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful". Section 15a(2) provides that in making such a determination:

> The Commission shall give due consideration, among other factors, . . . to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

In order to implement these statutory requirements, the Act provides in Section 15(7), that whenever the railroads publish tariffs stating a new rate or charge or change a

practice affecting any existing rate, the Commission is authorized to enter upon a hearing concerning the lawfulness of such affected rates and charges and at such hearing "the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, etc." is "just and reasonable".

The proceeding before the Commission was initiated under these statutory provisions. Since the railroads' proposal would effect a change in the services provided under the existing rates and would also change the total charges paid by shippers, the issues embrace not only (1) the lawfulness of the new charge *per se* but also (2) the broader question as to whether the aggregate of the existing rates plus the new charge would be just and reasonable and (3) whether the existing rates, if the service was deleted, would be just and reasonable for the reduced service. There does not appear to be any dispute among the parties but that the railroads had such a burden of proof as to the aggregate charges. The issue centers upon what type of proof is necessary under the statute in order to meet that burden.

Despite the requirement of Section 15a(2) that the "Commission shall give due consideration . . . to the need [for] a transportation service at the lowest cost consistent with the furnishing of such service and to the need of revenues sufficient . . . to provide such service", the railroads failed to present evidence showing a comparison between their costs of handling the grain traffic and the aggregate revenue from the existing line-haul rates and the inspection charge. Therefore, on the record there was no way of determining the relationship between costs and revenues at the proposed combination of rates plus the new charge. Obviously, the Commission could not give the "due consideration" required by Section 15a(2) of the

Act to whether this proposal would result in the "lowest cost consistent with . . . the need of revenues sufficient . . . to provide such service" when the railroads failed to present evidence comparing the costs and revenue. In the absence of such data, the railroads failed to present evidence discharging their burden of proof to establish that the proposed combination of rates and charges would be just and reasonable in the aggregate.

The statutory requirement of such evidence to meet the burden of proof in this type of situation has been recognized in a long line of Commission and court cases. *Secretary of Agriculture* v. *U. S.*, 347 U.S. 645, 652; *Transit Charges, Southern Territory*, 332 I.C.C. 664; *Terminal Charges at Pacific Coast Ports*, 255 I.C.C. 673 (1943); *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47, 61 (1915).

The most recent case on this point is *Transit Charges, Southern Territory, supra.* In its decision here, the Commission noted the following pertinent conclusions from that case:

> * * * The reasonableness of the proposal cannot be properly determined here without reference to, and consideration of, the line-haul rates, the services furnished thereunder, and the cost thereof. Clearly, in the circumstances presented, the proposed charge may not be divorced from the line-haul rate, for both, insofar as transit is concerned, are inextricably interdependent. Cf. Terminal Charges at Pacific Coast Ports, 255 I.C.C. 673 (1943); Unloading Lumber at New York Harbor, 256 I.C.C. 463 (1943); and see Secretary of Agriculture v. United States, 347 U.S. 645, 652 (1954). While it would seem preferable to have the various elements entering into, and constituting, the whole analyzed, if indeed they could be separated, the entire transportation service ren-

dered, including transit, must be examined in relation to the total rates and charges assessed. Respondents have not endeavored to base their action here on any facts bearing upon the revenue-cost relationship of the complete operation. Nor have they indicated the effect of the proposal either overall or with respect to the movement of the specific commodities involved. (pp. 683-684; A. 36-37.)

The reviewing court in the *Transit Charges* case similarly concluded that the total costs and revenue covering the line-haul rate, the proposed new charge, and the total services must be compared in order to determine whether the proposal is just and reasonable in its opinion in *Cinn. N.O. & T.P.R. Co.* v. *U.S.* (unreported) (S.D. Ohio, 1970), *aff'd per curiam* 400 U.S. 932:

> The question here is what should the carrier be paid for a service which it has been rendering, and has been charging for, and has been paid for (one knoweth not what) which it proposes to separate and charge separately for. Both the courts and the Commission have consistently held that what is a just and reasonable rate for the service to be separated and charged for separately cannot be determined by examining only the typical questions of cost, etc., with respect to the separate service. On the contrary, the typical questions must be directed to the overall or combined picture so that one may conclude (a) that the rate for the separated service, looked at by itself in the light of the applicable questions, is just and reasonable; and (b) that the remaining rate for the services, sans the separated service, is not rendered unjust or unreasonable. Whether the examination is in terms of "what portion of the line-haul rate represented the rate for the service to be separated," or whether the search in terminology is for the answer to this question: Does the new aggregate rate, composed of line-haul plus transit rates represent a just and reasonable rate for

all of the services (the aggregate of the severed and the nonsevered)—the principle is the same.

The Commission's decision in the instant case purported to distinguish the proof requirement applied in the *Transit Charges* case from that applicable here on the following grounds:

> The instant proceeding is distinguishable from the cited proceeding in two important respects. As indicated, approximately 480,000 in-transit inspections took place in 1969 at various points throughout the western district. The line-haul rates applicable on the grain to, from, and through those inspection points number in the thousands and, because of the complexities of the grain rate structure, vary to a large degree. A requirement that the reasonableness of the proposed charges cannot be determined without "reference to the line-haul rates, the services furnished thereunder, and the cost thereof," effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge. This inability was not present in the cited proceeding and even there, on appeal, the District Court of the United States, for the Southern District of Ohio, western division, *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *United States*, ... F. Supp. ..... (decided January 12, 1970), while sustaining the Commission on other grounds, indicated that the burden of proof required of the respondent railroads was erroneous.* (A. 37)

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* The Commission suggests in it decision (A. 37) and on brief that the court in *Transit Charges* concluded that the Commission had applied an erroneous burden of proof. However, the court did not question the rule of law as stated above or that the carriers have the burden of proof as to such issue. The court's conclusion on burden of proof was that the Commission imposed an erroneous quantum of proof by holding the carriers responsible to fulfill that burden "by clear and convincing evidence" rather than the proper burden of an

The Commission's statement here as to the thousands of rates involved that "This inability was not present in the cited proceeding . . ." demonstrates how far the Commission was stretching in an effort to support an untenable position. *Transit Charges, Southern Territory* involved rates throughout the entire Southern Territory of the United States, not only on grain and grain products but also on cotton. There is thus no substantial difference in the evidentiary problem in the two cases.*

The District Court held that this purported distinction as to the number and variety of rates affected was too specious to relieve the railroads from their statutory burden of proof:

> In effect, the Commission "excuses" the respondent railroads in the case before us from meeting the substantial proof requirement in satisfaction of its long established rule predicated upon the rail carriers' "inability" to meet that obligation here. In other words, the rule is viable and applicable where the Commission determines that the railroads are "able" to carry the burden of proof but it is not applicable in those instances where the Commission determines that the rail carriers are unable to do so. Such a departure is impermissible. *Secretary of Agriculture* v. *U.S.*, 347 U.S. 645 (1954), is dispositive of this issue. (A. 104)

(Footnote continued)
"affirmative duty to develop the evidentiary record to the point where it would be adequate to support a positive finding that the proposed schedules are lawful" *Cinn. N.O. & T.P.R. Co., supra.* Thus, the Commission's argument here that the court had nullified the Commission's conclusion as to burden of proof is irrelevant to the issues here.

* The Commission's decision and order in the *Transit Charges, Southern Territory* case merely adopted *in toto*, as its own, the examiner's statement of facts, findings, and conclusions. Subsequent to issuance of the examiner's recommended report the carriers cancelled the charge as it applied to grain and grain products. Nothing in the decision, however, turned on that fact. 332 I.C.C. 664, 665.

The District Court was clearly correct in holding that the burden of proof — a statutory burden of presenting evidence as to total costs and revenue as required by Section 15a(2) — could not be excused or relieved simply because thousands of rates were affected by the railroads' election to make simultaneous publication of these tariffs. If anything, the fact that the railroads' proposal would have such a broad effect upon so many rates and shippers makes the burden of proof requirement here even more compelling. Nor is the argument of impossibility or impracticality of proof valid. Over the years, there have been many cases before the Commission where thousands of rates on one or more commodities spanning huge geographical districts of the country were involved. Out of such cases there has evolved a practice whereby "typical evidence" representative of the mass of affected rates is developed and presented so that the whole may be judged on the basis of the representative comparisons.

The suggestion that a multiplicity of rates excuses a party from the necessity of proving its case is completely invalid. In the *New England Divisions Case*, 261 U.S. 184, a Commission order prescribing divisions between carriers in different territories was attacked on the ground that the Commission had acted unlawfully in prescribing divisions between groups of carriers without considering the carriers and their divisions individually. This argument did not impress the Court. It held that the Commission had authority to base an order on evidence typical* of the whole rate structure, pointing out that "To require specific evi-

* The principle that the Commission may make an order affecting numerous rates on the basis of evidence which it deems typical in character and ample in quantity has been followed by this Court in *Chicago & N.W.R. Co.* v. *A.T. & S.F. R. Co.*, 387 U.S. 326, 340-343 (1967), and *B.&O. R. Co.* v. *Aberdeen & R.R. Co.*, 393 U.S. 87, 92 (1968).

dence and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief," (p. 197) and that it had been the practice of the Commission for many years prior to 1920 to pass upon comprehensive rate changes "on evidence deemed typical of the whole rate structure." So here, too, evidence typical of the grain rate structure could have and should have been presented.

II.

THE FACT THAT THE AGGREGATE OF THE APPLICABLE RATES AND THE NEW INSPECTION CHARGE WOULD NOT EXCEED CERTAIN DEFUNCT RATES ORIGINALLY PRESCRIBED BY THE COMMISSION 37 YEARS AGO AND SINCE INCREASED OVER 150 PERCENT BY GENERAL REVENUE INCREASES DID NOT RELIEVE THE RAILROADS OF THEIR BURDEN OF PROOF.

As a second and "more significant" ground for not requiring the railroads to fulfill their burden of proof by showing cost and revenue comparisons as to the aggregate rates and charged involved, the Commission relied upon a "distinguishing feature" assertedly not present in the *Transit Charges* case and other cases where the statutory burden of proof has been applied:

> That difference is that the line-haul rate applicable to any movement of grain within the West when coupled with the proposed charge is less than the maximum reasonable level determined by this Commission. In no instance will the combined rate and charge exceed the maximum level prescribed in *Grain and Grain Products, supra*, [i.e. Docket 17000, Part 7, decided in the year 1934.] (A. 37-38).

As the Commission's decision indicates, the grain traffic actually moves today at rates substantially lower than the level of the Docket 17000 rates plus general increases and,

therefore, the rates cited by the Commission are not viable rates. (A. 14) As attested by the railroads' principal witness, the Docket 17000 rates are merely "paper" rates which move no appreciable amount of traffic today. (Ex. 1, P. 11; R. 26, 44) While rate comparisons have sometimes been used in the past by the Commission to test the validity of particular rates, it is well settled that mere "paper" rates are of no value as rate comparisons. *State Board of Equalization of Wyo.* v. *Abilene & S. Ry. Co.*, 305 I.C.C. 497, 512 (1959); *Sugar From Gulf Coast Port Groups To Northern Points*, 234 I.C.C. 247, 268 (1939).

The fact that the proposed charges plus the going rates do not exceed the Docket 17000 level plus intervening general increases is merely the incidental result of another problem which the railroads faced in this case. During the year preceding the publication of the tariffs here involved, the railroads had attempted to establish similar inspection charges but their method of publication was such that the inspection charges would have been added to all rates in their tariff, including the defunct 17000 rates which they have been carrying forward in their tariff because the 1934 prescription order of the Commission had never been revoked. When those tariffs were suspended, the railroads elected to cancel them rather than to attempt to have the old Docket 17000 order revoked; and then circumvented that problem by publishing the tariffs here in such manner that the charges were made inapplicable to any Docket 17000 rates or in any situation where any other rate plus the inspection charge would exceed the 17000 level. Thus, the reason why the Commission can find that the proposed charges and the applicable rates combined would not exceed the 17000 rates is simply the side effect of the railroad's decision not to seek revocation of the outstanding order in Docket 17000, rather than a reflection of any general recognition that the 17000 rates are a viable maximum reasonable level today.

Directly germane here is the Commission's finding that transportation circumstances and conditions have changed substantially since 1934.* Notwithstanding the intervening changes in transportation conditions, the disuse of these "paper" rates today and the general application of the much lower rates which actually move the traffic, the absence of any evidence in this record comparing cost and revenues today, and the fact that the Docket 17000 rates have been increased more than 150 percent above the level prescribed in 1934 by intervening general increases,** the Commission concluded that:

> The Docket No. 17000, Part 7, prescribed rates, as increased through the subsequently authorized general increases, are a currently effective maximum rate level for the movement of these commodities. (A. 38)

The Commission purported to reach that conclusion by a process of bootstrapping, whereby it relied upon two series of cases in neither of which was the justness and reasonableness of the Docket 17000 rates considered or established.

The Commission first referred to its decision in 1956 in *Grain and Grain Products*, 289 I.C.C. 261, in which the 17000 proceeding had been reopened for further consideration and possible modification. There the railroads had sought a limited reconsideration of the original order so as to remove restrictions in the earlier decision against the mandatory application of combination rates that was

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* The Commission found "that . . . [Docket 17000] rate level was fixed more than 30 years ago and conditions and circumstances relating to the railroad transportation of grain have changed in the interim." (A. 38.)

** A comparison of the Docket 17000 rates as prescribed in 1934 with the level of those rates plus all general increases up to the time of hearing herein is shown in Appendix C hereto.

deemed necessary so that the railroads could establish new reduced rates on grain. There was no issue raised in that case as to what are maximum reasonable rates. There was, accordingly, no occasion there for the Commission to consider whether the 17000 rates were a valid standard of maximum reasonableness at that time; and the Commission's finding here that it had "left standing" its 17000 order without modifying it to establish a new level of maximum reasonable rates is immaterial because the issue of whether the level of such rates was reasonable or should be changed was not there presented.

Southeastern Association of R. & Util. Commrs. v. *A., T. & S. F. Ry. Co.*, 321 I.C.C. 519, cited here by the Commission, also revolves around the question of whether the carriers should continue to assess combination rates rather than single factor rates. The complainants there were seeking single factor rates into the South in lieu of the existing system of combination rates. As the Commission there pointed out, the reasonableness of the rates in the West (including the 17000 rates) was not in issue:

> *Those factors in the combinations which apply to rail movements west of the Mississippi River and North of the Ohio River are not in issue per se,* and the complainants fear that the factors applying within the South cannot be reduced sufficiently to result in reasonable through rates. (p. 541) [emphasis supplied]

Likewise, in the third case cited in the Commission's report as one in which the grain rate structure had been "reviewed", *Grain and Grain Products,* 329 I.C.C. 824, the issue again was whether the method of making grain rates shall continue to be on the basis of the combination rates, as required by the 1934 order in Docket No. 17000, and in that case the Commission vacated such requirement. But

neither in that case nor in the other two cited cases was the appropriate maximum level of grain rates reviewed in the light of current transportation and grain industry conditions and no conclusion was entered reaffirming the validity of the old 17000 rates (long superseded by the lower rates which actually move the traffic) as the maximum reasonable level of rates on grain.

The rates on which this traffic moves far exceed the rates as prescribed in Docket 17000 in 1934. What the Commission here used as a standard of reasonable rates was a level of rates consisting of the Docket 17000 prescribed rates plus all the subsequently authorized general increases which have since increased those rates by over 150 percent. The Commission noted that in the general freight rate increase proposals made by the railroads during the past 10 years "particular attention has been given to the level of the grain rates and, in several instances, the increases in rates on grain and grain products were less than those authorized for the movement of other commodities (A. 38)". The key question is whether the Commission was correct in its legal conclusion that its action in allowing general freight rate increases over the years has established a new and higher standard of maximum reasonable rates on grain consisting of the 17000 rates plus all general increases allowed since 1934.

The Commission here has badly misconceived the legal significance and effect of its actions in the so-called "Ex Parte" general increase cases which allow percentage increases in rates throughout the country. A vital link in the Commission's line of reasoning turns on whether or not the Commission's orders in general revenue increase cases constitute an adjudication of the justness and reasonableness of specific rates, such as the grain rates in the West.

Since the general increase cases affect all the rates on all commodities throughout the country and must be decided within a short period of time, there is no occasion for the Commission to consider whether the resulting rates on each commodity are at or above a maximum reasonable level. The Commission grants percentage increases in rates in general revenue proceedings based upon its consideration of the carriers' general revenue needs, grouping the carriers territorially. The railroads themselves have consistently taken the position when their general revenue increases have been attacked in court that the Commission was not setting new maximum reasonable levels of rates. In *Alabama Power Company* v. *U.S.*, 316 F.Supp. 337 (D.C. 1969), affirmed, 400 U.S. 73 (1971) the railroads argued that the Commission's decision in a general increase case, Ex Parte 259, was not judicially reviewable because the Commission does not prescribe maximum rates on any particular commodities in such a proceeding:

> In the words of the *Algoma* court, plaintiffs have obviously "misconceived the real nature and effect of the Commission proceeding". The language relied upon by plaintiffs does not change the permissive nature of the Commission's action. Thus, the increased rates are carrier made rates and are not rates established by the Commission order here challenged. *Approval of a general increase program does not constitute a determination that particular rates on particular traffic are just and reasonable.* It is only the latter type of action that is subject to court review. [Emphasis added] (Railroads' Brief in *Alabama Power, supra.*, page 25).

The three-judge court in that case held that it had no jurisdiction to review the general increase decision because the Commission prescribed no particular rates but merely held that the carriers might file the new rates without suspension, citing *Algoma Coal & Coke Co.* v. *U.S.*, 11 F.Supp. 487 (E.D. Va., 1935).

The Commission can not be held to have established maximum reasonable rates in decisions in general increase cases which are not subject to judicial review. There is no evidence in this record as to the reasonableness of these rates, only the Commission's cititation of its permissive allowance of such new rate levels in the general increase cases. If the Commission's position were sustained in the instant case, the untenable result would be that a maximum reasonable level would have been set in the general increase cases, where no judicial review of that issue was permissible, and the Commission would be applying that here as *res judicata* as a standard of reasonableness which could not be tested on its merits here by judicial review. In *National Small Shipments Traffic Conference, Inc.* v. *U.S.*, 321 F. Supp. 500 (S.D. N.Y., 1970) the court dealt with this point of whether general increase cases establish maximum reasonable levels of rates on the commodities involved and concluded:

> The situation before us, then, does not resemble the pattern in those cases in which courts have held that orders of the Commission discontinuing investigations in "general revenue proceedings" of rail carriers are not reviewable. [Citing cases] *In the general revenue cases the Commission does not approve specific rates as reasonable. Rather, it hands down permissive orders which do not purport to prescribe or decide the lawfulness of particular charges.* [Emphasis added] (pp. 505-506)

Up until this point in time, the Commission has recognized that its decisions in general increase cases only mean that the trillions of rates in their tariffs, collectively, will not produce an excessive return *in toto* when increased by the general percentages authorized. In no sense is there a finding that the rates on any particular commodity (no less all individual commodities) are not unreasonably high. For

such a finding would require specific consideration of the rates on every commodity, a task which the Commission can not undertake in the context of cases designed to meet a shortage of over-all revenue. It was thus explained in the Commission's leading investigation case, *Class Rate Investigation, 1939*, 281 I.C.C. 213 at page 281 that:

> The general authorization of percentage increases does not stand as a legislative finding that rates or rate bases, increased successively in a long series of proceedings, are just and reasonable.

Perhaps the clearest statement from the Commission as to the very limited effect of the findings made in general increase cases is found in another investigation case, *Coal from Illinois to Alton and East St. Louis*, 274 I.C.C. 637 (1949):

> Respondents' assumption, that the reasonableness of the present interstate rates is not open to question because rates found reasonable 20 years ago have taken only the general rate increases, is without foundation. In approving both of the general rate increases relied upon we said that the rates increased as permitted are not considered as prescribed rates, within the meaning of *Arizona Grocery Co.* vs. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370. The effect of that statement is equivalent to saying that while general increases were found reasonable, such general approval does not have the effect of approving any particular increased rate as not being in excess of a maximum reasonable rate. (274 I.C.C. at p. 670).

Thus, the Commission's attempt here to use rates prescribed in 1934, plus more than ten intervening general increases, as a current standard of reasonableness is directly at variance with its own understanding of the limited effect of general increase cases over the years.

In the earliest leading court case on this subject, *Algoma Coal & Coke Co.* v. *U.S.*, 11 F.Supp. 487 (E.D. Va., 1935), the court reviewed the role of the Commission in general increase cases and held that the Commission was not determining "just and reasonable rates for particular traffic" (p. 493); that the Commission "*prescribed* no particular rates"; that the resulting rates are "*carrier made* rates and not *Commission* made rates" and that the "dominant consideration was the railroads' need of additional revenue" (p. 494). Similarly, in *Atlantic City Electric Company* v. *U.S.*, 306 F.Supp. 338 (S.D. N.Y., 1969) the limited scope and function of the "*ex parte*" cases was reviewed. The court cited these normal findings from the Commission's decision:

> We do not herein purport to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does our order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (332 I.C.C. 715).

The court then stressed that the real issue before the Commission was the "need of revenues" overall; that the Commission's decision "neither prescribed nor specifically authorized a particular rate on a particular commodity"; and that issues as to whether the increased rates on particular commodities are just and reasonable were not before the Commission in revenue need cases and would have to be resolved, if at all, in separate proceedings* involving such issues (pp. 341-343).

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* The two types of cases in which the issue would arise are complaint proceedings (wherein the complainant has the burden of proof) or, as in the instant case, an investigation proceeding (wherein the railroads have the burden of proof).

Even more recently, in *Electronic Industries Assn.* v. *U.S.*, 310 F.Supp. 1286 (D. Wash. D. C., 1970), the court reconfirmed the principle that the issue in the "ex parte" cases is only whether there is a general "increased revenue need" and held that the Commission does not pass upon issues as to the justness and reasonableness of the resulting rates on electrical products or any other commodities (p. 1289). It is pertinent that the plaintiff there had brought evidence before the Commission of the type which the court in *Transit Charges - Southern Territory* had held necessary to determine justness and reasonableness, *viz.*, cost and revenue comparisons on its commodity, but the Commission dismissed that and all similar evidence as irrelevant to the issue in the general revenue cases:

> A number of protestants submitted studies showing costs and revenues for the transportation of particular commodities or types of traffic. Additional revenue required to meet increased operating costs and fixed charges must be obtained from all traffic insofar as possible, whether or not specific traffic is profitable, or contributes more or less revenue, or incurs more or less costs than other traffic. Costs of specific commodity movements are not in issue. . . . The compilation, presentation, and evaluation of data in such massive proportions, as urged by protestants, would make impossible the effective prosecution of our regulatory function, and is not required by the Interstate Commerce Act. *Increased Freight Rates, 1968,* 332 I.C.C. 714, 716.

Moreover, the Commission's theory here that its consideration of rates and its allowance of increases in general revenue cases constitutes the establishment of a new just and reasonable level of rates is such that it would be in no sense limited to rates which had been originally prescribed by the Commission (such as the Docket 17000

rates) and, hence, attempts to prove too much. Its broad argument that the justness and reasonableness of particular rates is established by the Commission's authorization of a general increase on all rates could in no way be confined merely to such particular rates in the tariffs as had their original basis in Commission prescription. Thus, while the Commission found here that in general increase cases during the past 10 years "particular attention" had been given to grain rates and in several instances lesser increases authorized on grain than on other commodities, what it actually did in those cases was to consider and limit the increases on the "going" rates which move the traffic and it limited the increases on such rates (which are below the Docket 17000 rates). The logical result of that argument is that, if the rates resulting from the general increase cases thus become maximum reasonable rates, the "going" rates on grain which would be here effectively increased by the new charge are themselves maximum reasonable rates.

In the light of the foregoing judicial and Commission decisions consistently holding that the ex parte decisions simply authorize additional revenue as needed by the railroads and do not consider or decide whether the resulting rates are just and reasonable, the Commission's reliance upon its ex parte decisions as a substitute for requiring the railroads to submit evidence establishing the justness and reasonableness of these rates is reversible error.

III.

THE COMMISSION MISINTERPRETED THE RAILROADS' BURDEN OF PROOF REQUIREMENT BY IMPOSING THE BURDEN ON THE SHIPPERS ON THE ISSUE OF TRAFFIC DIVERSION TO COMPETING MODES.

The second basic deficiency in the Commission's decision is its shifting to the shippers the burden of proving whether the increased total charges would result in diverting rail traffic to competing barge and truck lines. Because the District Court set aside the Commission's decision on the grounds discussed above, it did not reach this issue. This is an important issue to the shipping community and this Court is asked to resolve it even though the District Court's decison be affirmed on the basis of the conclusions set forth in its opinion.*

Where, as here, the railroads propose to delete a particular service from the aggregate services covered by their line-haul rates and to provide a separate charge for such service, thereby increasing their total charges for the same total service, rail service becomes more costly and less attractive to the shippers. If the charge proposed is substantial and the competitive situation with other modes is admittedly intense (as here), it is likely that traffic diversion would result to other modes which could reduce the railroads' net revenue. Section 15 a (2) of the Interstate Commerce Act, therefore, specifically requires the Com-

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* In determining whether the action of the court below was or was not correct in setting aside a Commission order, this Court does so irrespective of the reasoning by which such action was induced. *Interstate Commerce Commission* v. *Ill. Cent. R.R.*, 215 U.S. 452, 471 (1910); c.f. *Assigned Car Cases*, 274 U.S. 564, 580 (1927).

mission to make a determination as to the "effect of rates on the movement of traffic by the carrier or carriers" which propose new rates and charges in determining whether they would be "just and reasonable". And Section 15 (7) of the Act imposes upon the railroads the burden of proof on all the issues as to whether a proposed change in rates and charges is just and reasonable.

The *Transit Charges* case sustained the Commission's decision squarely upon the findings and conclusions of the Commission, under Section 15 (a) (2), of potential diversion of traffic from the rails to the trucks. In the instant case, the Commission's report recognized that there is an issue as to the effect of prospective diversion on the railroads' revenue. However, after noting the dispositive findings on this issue in *Transit Charges, Southern Territory*, the Commission here attempted to distinguish it:

> One of the grounds relied upon by the division in *Transit Charges, Southern Territory, supra*, was that the proposed increase in charges might well result in substantial diversion of the considered traffic with a diminution, rather than an increase, in revenues. Similar conclusions are not warranted here. Comparative costs to the shipper of the movement of grain by railroad versus the movement by truck or barge is essential before a decision can be reached on diversion, and there is no showing here which relates the cost of truck or barge transportation to the cost of rail transportation with the inspection charge added. (A. 39).

By the above findings the Commission here found it "essential" that there be shown of record "comparative costs" of movement via railroad and truck or barge in order to make a decision on the diversion issue; and, since it found no evidence as to such costs, there is a failure of

proof on that issue which the Commission implicitly finds was the burden of proof of the shippers, rather than the railroads. But Section 15(7) of the Interstate Commerce Act imposes that burden upon the carriers, not upon the shippers. Upon the Commission's finding that there was no evidence as to comparative costs via rail and truck, a conclusion should have been made that the carriers failed to meet their burden of proof.

The Commission's action in removing the burden of proof on this issue from the railroads and imposing it upon the shipper protestants is directly contrary to statute. Section 15(7) of the Act places the burden of proof as to justness and reasonableness upon the carriers; and Section 15 a (2) makes this matter of the effect upon the railroads' revenues an issue which must be considered in determining justness and reasonableness. Accordingly, since the Commission has here required the shippers "to leap a burden of proof requirement not in accordance with law" *Cincinnatti, New Orleans and TP Ry. Co.* v. *U. S., supra*, its report and orders must be set aside.

It is well settled that part of the railroads' burden of proof to show that this proposal is just and reasonable is the requirement that they establish that it will result in a gain in net revenues, taking potential diversion to other modes of transport into consideration. *Ex Lake Iron Ore from Chicago to Granite City*, 123 I.C.C. 503, 504 (1927); *Fresh Sea Food from and to the South*, 210 I.C.C. 605, 613, (1935); *Games or Toys, Inflated, Classification Ratings*, 294 I.C.C. 227, 231 (1955); *Phosphate Rock from Points in Florida to Points in Virginia*, 313 I.C.C. 495, 501 (1961), sustained, *Atlantic Coast Line R. Co.* v. *United States*, 209 F. Supp. 157, 159-160 (S.D., Fla. 1962).

Immediately following the finding in the report concerning burden of proof quoted above, which erroneously as-

signed the burden to the shippers, there appears the following enigmatic finding:

> Grain will continue to be moved by railroad, even if it becomes necessary to pay the proposed charge because of the advantages, such as transit and reconsignment, that are available. (A. 39).

This is a classic ambiguous finding. Taken at face value, it would mean merely that "some grain" will continue to be moved by railroad. That would not dispose of the question of the revenue effect of this proposal. If read as meaning that all grain which presently moves via rail, and is inspected, will continue to move via rail, it is contrary to all the evidence of record. No one testified that all this grain would continue so to move.

A large number of shippers testified that the imposition of this charge would lead directly to a substantial diversion of traffic to trucks. Both transit and inspection are necessary in order for the rail service to continue to be attractive to shippers (Ex. 106). By taking away one of the key incidents of rail service, *i.e.*, the right to have an inspection in the rail car at the line-haul rate, the railroads would be taking away one of the legs which holds up the rail movement, and the result will be a substantial diversion of traffic from the rails to other modes. (Exs. 106, R. 1266; 89, R. 1152, 1233; 90, R. 1153, 1154; 91, R. 1153, 1154; 93, R. 1153, 1306; 95, R. 1153, 1155; 96, R. 1153, 1155; 99, R. 1153, 1307; 108, R. 1267; 109, R. 1268, 1269; 87, R. 1150, 1151; 121, R. 1345, 1365).

The proposed charge of approximately $17.00 (current level) per car would result in an effective increase of 1.5 cents per cwt. in the charges assessed on movements of grain. This flat charge per car would fall heavily on the short-haul gathering rates on which the whole grain moves into the primary markets, such as Chicago, Kansas City,

etc. Typically, those rates range between 11 and 20 cents per cwt., making this an increase on the gathering movements of 10 per cent (Ex. 89, App. F. and G; R. 1152, 1233). As was detailed extensively in the shippers' evidence, this short-haul traffic to the primary markets is particularly susceptible to diversion to trucking.

The close competition and the effect upon the traffic movement of the effectiveness of the inspection charge since May 4, 1971, are both shown by the following movement statistics to the Chicago market:

COMPARISON OF RAIL AND TRUCK GRAIN RECEIPTS AT CHICAGO*

	Rail (000 Bu)	Truck (000 Bu)
1957	145,293	12,599
1960	124,006	31,701
1963	149,013	51,398
1966	128,399	61,060
1969	97,955	81,510
1970	109,050	74,715
1971	72,823	79,148

The above table shows that since the charge was established in 1971, the trucks are now handling the major share of the grain to Chicago for the first time in history.

The foregoing testimony was unchallenged by the railroads. Witness after witness for the railroads actually

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* Years 1957 through 1969 are from Ex. 91; years 1970-1971 are from the Affidavit of Frank Polom filed in this Court in opposition to issuance of a stay.

detailed the severe competition which they encountered from the trucks throughout their territories, thereby corroborating the testimony of the shipper witnesses that any increase of the magnitude here proposed would result in additional diversion from the railroads and a loss of revenue. (Ex. 14, pp. 6-7, R. 229, 236; Ex. 15, p. 7, R. 237, 239; Ex. 22, pp. 3-5, R. 269; Ex. 23, p. 5, R. 269, 270; Ex. 25, p. 2, R. 270 *et al.*) The fact that the present rail rates are carefully pegged so as to be no lower than necessary to meet truck competition is admitted and further corroborates that the proposed increase in charges would create significant diversion from the rails. (R. 1829-30).

One railroad witness appeared at the rebuttal hearing to acknowledge respondents' failure to meet the diversion issue. That witness, a retired employee of the C&NW, testified solely about conditions on that one railroad and made it clear that the conditions which formed the basis for his testimony were those "prior to May, 1969" when he was an active employee of that railroad (Ex. 146, R. 1801). His testimony was confined to conditions on that railroad in the state of Iowa and his observation was that "the cross-haul transportation by truckers (not having any inspection enroute at railroad siding or otherwise) involves direct movements to feeder lots." (Ex. 146, p. 10). The implication here being drawn, apparently, was that the inspection charge would have no effect on the truck volume to points where there has been no inspection in the past, such as feedlots in Iowa. His testimony in no way fills the void by all the railroads in this record as to the diversionary effect of this proposal upon the great bulk of the whole grain rail movement which is inspected on movements to primary markets (such as Chicago).

Contrary to the suggestion in the Commission's report, there is no void in the shippers' evidence as to comparative costs of truck transportation with the costs of rail

transportation plus the inspection charge. Witness Jefferson of the Indiana Farm Bureau Co-op explained how this proposal would create substantial diversion of rail tonnage to truck movement. He submitted a map showing the competitive rail and truck gathering rates to Chicago and illustrating that the addition of this charge of about 1.5 cents per cwt. would "eliminate the economic feasibility of rail shipments" to Chicago from the entire northeastern section of Indiana. (Ex. 94, p. 3 and App. A; R. 1240-41.)

Based upon the foregoing review of the record as a whole, the Commission's finding that "grain will continue to be moved by railroad even if it becomes necessary to pay the proposed charge because of the advantages, such as transit and reconsignment that are available (A. 39)", if it be interpreted as a finding that there will be no diminution of rail traffic, is not supported by substantial evidence of record, is entirely gratuitous and arbitrary, and is contrary to the extensive and substantial evidence of the shipper witnesses that there would be diversion to trucks.

Since the Commission's conclusion as to truck diversion is essential to the ultimate finding of justness and reasonableness and rests upon an erroneous interpretation of the statutory burden of proof and is also unsupported by and contrary to substantial evidence, its report and orders should be set aside for that additional reason.

IV.

SECTION 15(7) OF THE INTERSTATE COMMERCE ACT, WHICH PROVIDES THAT THE COMMISSION MAY SUSPEND NEW CHARGES FOR SEVEN MONTHS PENDING ITS DECISION, DOES NOT PRECLUDE A COURT WHICH SET ASIDE SUCH DECISION FROM ENJOINING THE CHARGES UPON REMAND TO THE COMMISSION.

Both appeals raise the question as to whether the District Court, upon setting aside the Commission's decision

for misapplying the burden of proof in a case where the railroads presented no evidence to satisfy such burden, had authority to restore the *status quo* by enjoining the further application of the charges during remand to the Commission. Their argument is based upon this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963), holding that Section 15(7) of the Act conferred exclusive power upon the Commission to suspend rates for seven months pending its decision.

The narrow question before this Court in *Arrow* was whether courts have the power to suspend rates before the issuance of a decision by the Commission. This court held that they do not have such power. But neither that decision nor Section 15(7) circumscribe the power of a court to enjoin rates after a decision by the Commission. The seven month suspension power created and occupied by Section 15(7), by its terms applies only to suspensions "pending such hearing and the decision" of the Commission.

Here, the hearing had been held and the decision issued by the Commission before the District Court acted. Section 15(7) does provide that "if the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate . . . shall go into effect at the end of such preiod." But that in no way abridges any power to enjoin these rates on or after September 29, 1971,* since as of that date the "order" described had been entered and Section 15(7) guarantees no further continuation of such changed rates beyond that date.

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* The date of the Commission's administratively final decision and order in this case. (App. 64).

After the Commission's decision has been made and its order entered, Section 15(7) does not purport to control the suspension or non-suspension of such rates, no less to provide a passport for the continuing effectiveness of such rates during an indefinite period of further litigation. Indeed, it affirmatively confers upon the Commission authority to take any appropriate action with respect to such rates as of the time it reaches its decision and order. Section 15(7) does not purport either to confer or restrict any judicial power as of the moment the Commission's decision and order has been entered. It only allows a period of life for changed rates during the interim between the expiration of the seven months suspension and the entry of a decision and order by the Commission, regardless of whether or not the changed rates are just and reasonable.

Section 15(7) provides that after the hearing and decision the Commission shall enter any appropriate order. And Section 15(7) of the Act provides that where the charges have not been shown to be just and reasonable an order should be entered that the carriers thereafter shall not continue to publish or collect such charges. Thus, as of the time the Commission made its decision herein, the case became ripe for an order either directing the continuation of the tariffs or proscribing their further use. The continued life of the new charges then became wholly dependent upon whether or not the carriers had proved their case. The brief free ride which Section 15(7) guarantees regardless of the merits of the new rates and charges had ended. The nature of the relief at that point became dependent entirely upon whether the carriers had sustained their burden of proof.

Since the District Court held that the carriers had not sustained the statutory burden of proof in accordance with

the uniform judicial and administrative interpretation of what is required to show that rates and charges are just and reasonable, it was then appropriate for the court to enjoin or suspend the further operation of such rates. Such action by the court was consistent with the provisions of the Administrative Procedure Act which direct the reviewing court to:

> (1) Compel agency action unlawfully withheld or unreasonably delayed (5 U.S.C. § 706).

Whether the court directed the Commission to order the rates cancelled, an action unlawfully withheld by the Commission because it misapplied the burden of proof in this case, or whether it ordered the rates canceled directly upon remand to the Commission, the effect is the same and is an incidental power of the reviewing court.

While the *Arrow* decision held that the courts have no power to extend the seven-month suspension period where the Commission had not yet reached its decision and order, there is no mandate in Section 15(7) which denies the federal courts the power to protect the public by maintaining the *status quo* which existed prior to the inception of the litigation at the Commission under circumstances where the carriers failed to produce any evidence to satisfy their statutory burden of proof. The issue presented for decision was stated by this Court there as:

> The problem [is] . . . whether the application of new rates might be stayed pending decision [by the Commission] as to their lawfulness. (p. 663.)

Then, reasoning that multiple individual court actions against certain of the rates and charges involved in a new proposal pending before the Commission before decision would interfere with the "uniformity" of the "timing" of rate changes and finding "a close nexus between the

suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates", this Court held that Section 15(7) precludes judicial injunction while the Commission has not yet reached its decision (p. 668).

In so ruling, however, this Court drew a sharp contrast between the lack of judicial power to enjoin or suspend before an administratively final decision by the Commission, on the one hand, and, on the other, the power to grant injunctive relief which it specifically recognized as vesting in the district courts upon review of a Commission decision:

> A court's disposition of an application for injunctive relief [before the Commission has issued a decision] would seem to require at least some consideration of the applicant's claim that the carriers proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain. Judicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review. These considerations explain why courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission. If an independent appraisal of the reasonableness of rates might be made for the purpose of deciding applications for injunctive relief, Congress would have failed to correct the situation so hazardous to uniformity which prompted its decision to vest the suspension power in the Commission. Moreover, such a procedure would permit a single judge to pass before final Commission action upon the question of reasonableness of a rate, which the statute expressly entrusts only to a court of three judges

reviewing the Commission's completed task.[22] (pp. 669-670).

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[22] Thus we do not reflect in any way upon decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels. *Cf., e.g. Scripps Howard Radio* v. *F.C.C.*, 316 U.S. 4; *West India Fruit & S.S. Co.* v. *Seatrain Lines, Inc.* 170 F.2d 775; *Board of Governors* v. *Transamerica Corp.*, 184 F.2d 311. Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action, and has never been recognized in derogation of such a clear Congressional purpose to oust judicial power as that manifested in the Interstate Commerce Act.

Thus, rather than presenting a "square conflict" with *Arrow*, as claimed by Appellants, the action of the court below, in reviewing the Commission's administratively final decision, setting it aside, and issuing appropriate injunctive relief, was expressly contemplated and approved in the *Arrow* case by this Court.

Appellants argue that by enjoining these charges the District Court is preempting the primary jurisdiction of the Commission. But when a court determines to grant equitable relief following review of an agency's rate order, it does not thereby decide whether or not the rates are just and reasonable. That question, as was done here, is remanded to the Commission. The District Court only decided that the statute requires evidence of justness and reasonableness of the aggregate charges, which was concededly not presented here, and resolved the equitable issue of whether such charges should continue to be charged during remand. These charges are in effect today only because the Commission failed to apply the statutory burden of proof in this case. Since the railroads failed to conform to their statutory obligation to produce

appropriate evidence to justify the new charges, it is only equitable that they should not remain in effect during the remand occasioned by their failure. It in no sense intrudes upon primary jurisdiction for the equity court to exercise this power to enjoin the charges for this interim period during which Appellants argue that the Commission itself has no power to order such relief.

Since this Court in *Arrow* relied upon legislative history in concluding that Section 15(7) vested exclusive suspension power in the Commission during the period of its hearing and initial decision, consideration of legislative history may also be helpful here. The statutes governing judicial review of orders of the Commission by three-judge courts (28 U.S.C. § 2321-2325) are the result of the Urgent Deficiencies Act of 1913, 38 Stat. 220. That Act replaced the Commerce Court with three-judge district courts as the forum for review of Commission decisions and transferred substantially the same judicial review procedures and powers as previously established for the Commerce Court in the Mann-Elkins Act of 1910. It was the Mann-Elkins Act which first gave the Commission power to suspend carrier-initiated rates under Section 15(7) of the Act.

The legislative history of the Mann-Elkins Act is enlightening on the goals which Congress sought to achieve in establishing procedures for judicial review of Commission orders in the Commerce Court and in laying rate suspension power in the hands of the Commission. In citing the reasons for the creation of the Commerce Court, Representative Mann of Illinois, principal architect of the bill in the House, said:

> . . . We are met with the proposition in this country where litigation is so prolonged that the delay in justice amounts practically in many cases to a denial of jus-

> tice. These interstate-commerce cases . . . have become strung out until they have often amounted to a denial of the right of shippers to reasonable rates within a time which would be of any value to the shippers." (45 Cong. Rec. 4573, House debates on H.R. 17536, April 12, 1910)

During the same debates, Representative Hardy of Texas spoke of the relationship between the judicial power conferred upon the Commerce Court and the suspension power conferred upon the Commission:

> . . . (T)he bill provides that, pending the appeal from the Interstate Commerce Commission (finding the proposed rate either shown or not shown to be just and reasonable) to the court, the new schedule goes into effect after one hundred and twenty days (now seven months) from the date of the order of the Commission (suspending the rate). It can only be suspended after the end of one hundred and twenty days by the final action of the Commerce Court, and perhaps the Supreme Court, affirming (or setting aside) the action of the Commission . . . (49 Cong. Rec. 5163, House debates on H.R. 17536, April 21, 1910)

In considering a proposed amendment to the bill for appeals to the Supreme Court of interlocutory orders of the Commerce Court, Representative Mann said:

> . . . The Commerce Court under this bill would proceed with this case to a final judgment, and proceed to a final judgment at an early day, instead of having, as is complained of in the country, all kinds of appeals on interlocutory orders, letting the original case remain in the Circuit Courts almost forever. We want some process by which we can finish these cases, and obtain a determination, so that the shipper who has been ruined may have his rights before, and not after, he goes into bankruptcy. (45 Cong. Rec. 5428, House debates on H.R. 17536, April 26, 1910)

This history shows that the primary purpose of the Act was to secure speedy relief for shippers from unreasonable rate proposals so that they should not languish and die during protracted litigation. The District Court's decision in this case, enjoining the effectiveness of the inspection charge pending the Commission's decision on remand, was clearly consistent with this legislative purpose and with this Court's decisions recognizing the ancillary equitable power of courts on review to fashion the relief granted to the particular exigencies of each case. *Ford Motor Co.* v. *National Labor Rel. Bd.*, 305 U.S. 364, 373-374 (1939); *Inland Steel Co.* v. *United States*, 306, U.S. 153, 156 (1939); *United States* v. *Morgan*, 307 U.S. 183, 191 (1939).

In *United States* v. *Morgan*, *supra*, the Secretary of Agriculture issued an order prescribing reduced rates for stockyard services at Kansas City under the Packers and Stockyards Act, 7 U.S.C. §181, *et seq.* Kansas City packers sought judicial review in the district court. The court temporarily enjoined the reduced rates, but required the packers to pay into court, during the duration of the injunction, the difference between the reduced rates enjoined and the higher rates collected. The court sustained the Secretary's order, but this Court reversed and remanded for procedural impropriety. *Morgan* v. *United States*, 298 U.S. 468 (1935). The later proceedings in this Court were concerned with whether or not the fund which had been accumulated in the District Court during the review proceedings should be distributed to the Kansas City packers before the Secretary reached a decision in the remanded proceedings. Significantly, however, this Court in that opinion noted that the District Court permanently enjoined enforcement of the Secretary's rate order in remanding the matter. (307 U.S., at p. 187, note 1). No appeal was taken from that action. During the course of its opinion, this Court said:

> . . . The other guiding principle is that in reviewing the action of the Secretary and in similarly reviewing the action of the Interstate Commerce Commission in conformity with the provisions of the Urgent Deficiencies Act, the district court sits as a court of equity, see *Ford Motor Co.* v. *National Labor Relations Bd.*, 305 U.S. 364, 373; *Inland Steel Co.* v. *United States*, 306 U.S. 153 . . . (*id.* at p. 191).

The district court there recognized that equity would not permit the continued collection of rates or the continued requirement to impound the difference in rates during remanded proceedings, where the agency order approving the rates had been improperly entered.

The equitable power to issue injunctive relief against new rates and charges after the Commission has reached an administratively final decision has been recognized in other cases. In *Ad Hoc Com. on Consumer Protection* v. *U.S.*, 313 F.Supp. 119, 124 (D, D.C., 1970), a three-judge District Court temporarily enjoined increased rates which had gone into effect following the expiration of the statutory suspension period where the Commission had made its investigation under section 15(7) and issued a decision approving the rates. Initially, the judge to whom application had been made for a temporary restraining order had declined to grant it on the basis of lack of jurisdiction, citing *Arrow*. On appeal, the Circuit Court of Appeals for the District of Columbia remanded the matter to the District Court to convene a three-judge Court to hear the request for injunction and held that the court's power to grant temporary relief was:

> (N)ot limited by *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, on review of a final order of the Commission . . . *Arrow* concerned unwarranted judicial intrusion prior to the exercise of administrative expertise; here the Commission has investigated and ap-

> proved the tariffs in question and thus has completed its function subject to a possible motion for reconsideration under 49 USC § 17 (1963). The convening judge in exercising his discretion may consider the order of Docket No. 8486 sufficiently final for purposes of *Arrow*. (313 F.Supp., at p. 124)

To the same effect is *Cantlay & Tanzola* v. *U.S.*, 115 F. Supp. 72 (S.D. Cal., 1953). There the court similarly recognized that courts can not suspend or otherwise enjoin rates prior to a decision by the Commission and then upheld:

> the inherent equitable power (of the court), following final hearing and determination of the action, to award injunctive relief "ancillary to setting aside the order of the Commission . . . in order to carry out the purpose of Congress to make the judicial review effective." (citing *Pittsburgh G.W. Va. Ry. Co.* v. *U.S.*, 281 U.S. 479 (1930); *Inland Steel Co.* v. *U.S.*, 306 U.S. 153 (1939); and *Central Kentucky Gas Co.* v. *Railroad Co.*, 290 U.S. 264 (1933)).

Against this well-founded body of precedent, Appellants cite only *National Small Shipments Traffic Conference, Inc.* v. *U.S.*, 321 F.Supp. 500, 515 (S.D.N.Y. 1970). There, without citing any reasons or precedent (other than *Arrow*, which it recognized as distinguishable), that court negated the judicial power to enjoin rates after a final Commission decision. But the statements there concerning the power of courts to enjoin rates were *dicta*, inasmuch as that court had only been asked to "permanently enjoin the Commission's order*" and had not been asked to enjoin the rates

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* A "permanent injunction" would be inimical to remand and would effectively terminate the entire litigation. In the instant case the court below has remanded the case to the Commission for further proceedings and, in so doing, its action is consistent with the holding in *National Small Shipments* on the issue raised there

(p. 513). Thus, the comments in *National Small Shipments* concerning lack of judicial power to enjoin rates upon setting aside a Commission decision represent an excursion into a point which was not raised for its decision and which had neither been briefed nor argued by the parties. While the distinction can also be drawn that there the carriers were not parties to that case and were beyond the court's jurisdiction, the *dictum* in *National Small Shipments* on the judicial power to enjoin rates was clearly wrong and directly contrary to the rule of law as correctly acknowledged by this Court and followed consistently in the decisions cited *supra*.

The Memorandum of the Department of Justice presents a "policy" argument in support of stripping the equity court of its injunction power which is both calloused and unrealistic. The suggestion is that since the rationale for *Arrow* and a substantial part of the justification for conferring the seven-month suspension power upon the Commission was to avoid the issuance of partial injunctions by courts throughout the country (which protected certain shippers but not others), the courts should not have the injunctive power here because it could lead to lack of uniformity. The argument is that since there is a possibility that some shippers could not be protected by the court, no shippers should be protected from the results of an invalid decision.

This ignores the fact that Congress gave jurisidiction over the Commission's decisions to the federal courts. The Commission's decisions can be attacked in whole or in part. This fully contemplates the possibility that one group of shippers or carriers could seek relief setting aside only that portion of a decision which affects them. But the "uniformity" problem was settled by giving review juris-

diction to the three-judge federal courts and providing for direct appeals to this Court. On the one hand, the Commission was given whatever responsibility exists to preserve uniformity during its seven-month-suspension period. On the other, the three-judge federal courts were given responsibility to resolve whatever problems of uniformity might arise out of their review of Commission decisions, subject to direct appeal to this Court.

It would be absurd to hold, as Justice Department argues, that a three-judge court is given the awesome power to set aside in whole or in part a Commission decision but that it does not have the incidental power to enjoin the rates approved therein during the period of remand. The railroads would be the real beneficiaries if this "uniformity" argument should prevail; and the shipping public, assertedly the beneficiaries of Justice Department's argument, would be left remediless outside the courthouse with the prospect of being forced out of business during the further litigation. The shipping public does not want the protection which Justice Department offers, i.e., "uniformity" in no prospect of injunctive relief for any shipper. The equity court is well suited to handle any problems of uniformity which might arise in cases involving review of Commission decisions.

Neither the Commission nor the railroad Appellants have presented any reasons of public interest or policy warranting an interpretation which would render the federal courts impotent to grant relief preserving the *status quo** when

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* The *status quo* is usually defined as the last peaceable status preceding the litigation. Here the litigation was initiated at the Commission at a time when the charges were not in effect. See *Sunbeam Corp.* v. *Economy Distrib. Co.*, 131 F.Supp. 791, 795 (E.D. Mich. 1955); *Gamlen Chem. Co.* v. *Gamlen*, 79 F.Supp. 622, 631 (W.D. Pa., 1948).

they set aside a decision of the Commission. Such a rule would preclude relief absolutely, regardless of the compelling basis for setting aside the Commission's decision and the drastic impact upon the shipping public. It is understandable why the railroads are motivated to take the extreme position that a Commission decision and order marks the beginning of an extended period of limbo where no authority can touch the rates during a period of further litigation, regardless of its nature or duration. Consider the situation which would result whenever a Commission order is set aside by a court if no power to enjoin or suspend the involved rates exists. If the railroads seek review of an adverse Commission decision (ordering cancelation of their new rates) and it is set aside, the new rates can then become effective with immunity. On the other hand, if the shippers seek review of an adverse Commission decision approving the new rates and it is set aside, the new rates would remain in effect. Either way, the carriers' new rates would be in effect whenever a Commission's decision is set aside. This situation would be inequitable to the shipping public. The courts must be allowed to retain the power to enjoin the rates in appropriate cases where the nature of the decision and the balancing of equities so require.

Perhaps no more graphic illustration of the absolute need for the right of the court to exercise its equitable power could be presented than that shown here. The major aim of the proposed tariffs is to create a barrier against inspections. As a result, the number of cars inspected has been reduced in amounts varying from an estimated 30 percent to 50 percent. This has meant and would continue to mean lower prices for the farmers, unemployment for the grain inspectors, business losses and imminent failure for the grain merchants dealing in inspected grain, etc., as detailed

in the affidavit of a grain industry spokesman in Appendix A hereto. In short, the continuing effectiveness of these charges is destroying the key elements of the grain marketing structure as it has existed for over 40 years. Thus, the charges which the railroads have not proved lawful under the applicable statutes have all but accomplished their goal of destroying the in-transit grain marketing system and they will complete that destruction if allowed to remain in effect upon remand. None of these injuries caused by the barrier effect of inspections not made or shipments not made would be recompensed by a refund of the unlawful inspection charges collected, the relief emphasized by Appellants.

There is a vast difference between the sufferance in *Arrow* of the few months gap between the expiration date of the seven month-suspension period and the Commission's administratively final decision, on the one hand, and, on the other, the open-ended time period which ensues after a remand to the Commission.* The most recently remanded grain case was pending before the Commission after remand for three years before the ultimate decision was rendered. *Transit Provisions on Wheat at Twin Cities, Minn.*, 341 I.C.C. 235 (remanded July 16, 1969; decided July 27, 1972). That case involved rates only via Minneapolis. It is frightening to contemplate how long the railroads might succeed in deferring a decision in the instant case which involves all points in the West.

Also to be considered here is the direct relationship between the relief available and the decision as to whether to pursue the right of judicial review. The grain trade nor-

* A period of about two years ordinarily elapses between remand and the further decision of the Commission.

mally looks from one harvest season to the next. If the relief available after an invalid Commission decision were to be effectively attainable only after two years of litigation through the courts and an additional three years before the Commission, this would have a profound effect upon the decision of whether or not to seek judicial review. In this instance, justice delayed would mean no justice at all.

The Court is requested to uphold the power of the District Court to issue the equitable relief here afforded. The *Arrow* decision has left the shippers bereft of a remedy to protect their businesses during the period between the expiration of the seven month-suspension period and the Commission's decision on the merits. If the remedial vacuum were extended to include the period of years normally ensuing after remand it would unilaterally place the shipping public in jeopardy and leave the railroads outside the law during a prolonged period. If the regulatory scheme is to be effective, it can not include a loophole of this magnitude. The incentive for shippers to challenge invalid Commission decisions would be substantially destroyed unless the equity court retains an effective remedy. If, nonetheless, this Court should hold that the District Court does not have the power directly to restrain these charges, it is requested then to hold that the court has the power under Section 6 of the Administrative Procedure Act (5 U.S.C. § 706) to direct the Commission immediately to enter an order directing the cancellation of the charges for failing to meet the burden of proof on this record, without prejudice to its decision and order after the further proceedings on remand.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

CHARLES J. McCARTHY
1750 Pennsylvania Ave.
Washington, D.C. 20006

HAROLD E. SPENCER,
DANIEL J. SWEENEY
20 North Wacker Drive
Chicago, Illinois 60606
Attorneys for Appellees.

BELNAP, McCARTHY, SPENCER,
SWEENEY & HARKAWAY
Of Counsel

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